FILE COPY

PETITION NOT PRINTED

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 176

LEONARD SALDANA, PETITIONER,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 16, 1960

CERTIORARI GRANTED JUNE 27, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 176

LEONARD SALDANA, PETITIONER,

VS.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

February, 1958, Grand Jury

UNITED STATES OF AMERICA, Plaintiff,

v.

ALBERT ARROYO PALOMINO, LEONARD SALDANA, Defendants

No. 26878-CD

INDICTMENT

(U.S.C., Title 21, Sec. 174—Conspiracy to sell, sale of narcotics)—Filed and Endorsed June 11, 1958

The grand jury charges:

Count One

(U.S.C., Title 21, Sec. 174)

Prior to April 28, 1958, and continuing to the date of the return of this indictment, the defendants Albert Arroyo Palomino and Leonard Saldana agreed, confederated and conspired together to commit offenses against the United States, as follows: to receive, conceal, sell, and facilitate the transportation, concealment and sale of narcotic drugs in violation of United States Code, Title 21, Section 174.

The objects of said conspiracy were to be accomplished as follows: defendant Albert Arroyo Palomino would acquire heroin and would furnish the same to the defendant Leonard Saldana; the defendant Saldana would make arrangements with persons in the Los Angeles and Orange County areas to sell said heroin to said persons and would [fol. 3] receive money in exchange for said heroin.

To effect the objects of said conspiracy the defendants herein committed divers overt acts in the Central Division

of the Southern District of California and other places, among which were the following:

1. On April 28, 1958, the defendant Leonard Saldana delivered 1 ounce, 423 grains of heroin to Jayme Licuanan at 445 South McBride Street, Los Angeles, California, and received $400.00 in return therefor.

2. On May 7, 1958, the defendant Leonard Saldana delivered 1 ounce, 32 grains of heroin to Jayme Licuanan at 445 South McBride Street, Los Angeles, California, and received $200.00 in return therefor.

3. On May 21, 1958, the defendants Albert Arroyo Palomino and Leonard Saldana delivered 10 ounces 339 grains of heroin to Jayme Licuanan and Victor Segura at 445 South McBride Street, Los Angeles, California.

Count Two

(U.S.C., Title 21, Sec. 174)

On or about April 28, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Albert Arroyo Palomino and [fol. 4] Leonard Saldana knowingly and unlawfully sold and facilitated the sale to Jayme Licuanan of 1 ounce, 423 grains of heroin, a narcotic drug, which, as the defendants then and there well knew, had been imported into the United States of America contrary to United States Code, Title 21, Section 174.

Count Three

(U.S.C., Title 21, Sec. 174)

On or about May 7, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Albert Arroyo Palomino and Leonard Saldana knowingly and unlawfully sold and facilitated the sale to Jayme Licuanan of 1 ounce, 32 grains of heroin, a narcotic drug, which, as the defendants then and there well knew, had been imported into the United States of America contrary to United States Code, Title 21, Section 174.

Count Four

(U.S.C., Title 21, Sec. 174)

On or about May 13, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Albert Arroyo Palomino and Leonard Saldana knowingly and unlawfully sold and facilitated the sale to Jayme Licuanan of 1 ounce, 7 grains of heroin, a narcotic drug, which, as the defendants then and there well knew, had been imported into the United States of America contrary to United States Code, Title 21, Section 174.

[fol. 5] Count Five

(U.S.C. Title 21, Sec. 174)

On or about May 21, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Albert Arroyo Palomino and Leonard Saldana knowingly and unlawfully sold and facilitated the sale to Jayme Licuanan and Victor Segura of 10 ounces, 339 grains of heroin, a narcotic drug, which, as the defendants then and there well knew, had been imported into the United States of America contrary to United States Code, Title 21, Section 174.

A True Bill.

Robert E. Battles, Foreman.

Laughlin E. Waters, United States Attorney.

[fol. 6] In United States District Court

Minute Entry of Arraignment and Plea—June 16, 1958

U.S. Atty. by Assistant U.S. Atty: T. Conrad Judd, Esq.
Counsel for Defendant Jack Tenner, for Palomino.
Counsel for Deft. Saldana: Stephen Reinhardt, Esq. appointed.
Defendants both present in custody.

Proceedings: Arraignment and Plea.
Each defendant duly arraigned and states true name as charge.

Each defendant pleads not guilty to Counts 1, 2, 3, 4 & 5.

On motion of defendants' attorneys, It Is Ordered that bail be reduced to $10,000.00 for each defendant.

It Is Further Ordered that jury trial (estimated to last 2½ days) be set before the Hon. Peirson M. Hall at 10 a.m., July 15, 1958.

[fol. 7] In United States District Court

Minute Entry re Withdrawal of Not Guilty Plea and Entry of Plea of Guilty to Counts 1 and 2—June 26, 1958

U.S. Atty, by Assistant U.S. Atty: Thos. R. Sheridan.
Counsel for Defendant Stephen Reinhardt (appointed).
Defendant present in custody.

Proceedings: For hearing motion of defendant Leonard Saldana to withdraw plea heretofore entered.

Attorney Reinhardt makes a statement that defendant Leonard Saldana desires to change his plea to counts 1 and 2 of the Indictment. It is so ordered.

With permission of the Court Defendant Saldana withdraws plea of not guilty, heretofore entered, to counts 1 and 2 of the Indictment and now pleads guilty to counts 1 and 2.

Counsel waive probation report.

It Is Ordered that cause as to Defendant Saldana is continued to July 21, 1958, 2 PM, for sentence on counts 1 and 2, and disposition of counts 3, 4 and 5.

[fol. 8] In United States District Court

Minute Entries of Continuances—July 9, 1958

Proceedings: (Ex parte) (Trial now set for July 15, 1958).

Attorney for defendant moves for continuance of trial now set for July 15, 1958.

It Is Ordered that trial is continued to July 29, 1958, 10 a.m.

It Is Ordered that co-defendant Saldana is transferred before this Court for sentence.

[fol. 9] IN UNITED STATES DISTRICT COURT

On the Court's own motion, It Is Ordered that cause as to said proceedings is continued to July 22, 1958, 10 AM.

[fol. 10] IN UNITED STATES DISTRICT COURT

It Is Ordered that cause is continued to July 24, 1958, 10 AM, for sentence.

[fol. 11] IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF COURT'S ORDER WITHDRAWING PLEA OF GUILTY TO COUNTS 1 AND 2 AND RE-ENTRY OF PLEA OF NOT GUILTY—July 29, 1958

For sentence of Defendant Saldana on counts 1 and 2, and further proceedings as to counts 3, 4 and 5 of the Indictment in five counts.

It Is Ordered that trial is vacated as to Defendant Palomino, that bond of said defendant is forfeited, and that a bench warrant issue for Defendant Palomino.

Counsel makes statement as to Defendant Saldana.

On the Court's own motion It Is Ordered that plea of guilty, heretofore entered by defendant Saldana to counts 1 and 2 is withdrawn, and that plea of not guilty as to said defendant to all five counts of the Indictment is entered.

It Is ordered that cause as to Defendant Saldana is set for trial Aug. 5, 1958, 10 A.M.

[fols. 12-13] IN UNITED STATES DISTRICT COURT

MINUTE ENTRY DENYING OFFER OF PLEA OF GUILTY TO COUNTS 1 AND 2—August 1, 1958

Proceedings: For change of plea of Defendant Saldana.

Motion to transfer this case to Judge Clarke is denied.

Offer of plea of guilty by defendant Saldana to counts 1 and 2 of the Indictment is denied.

[fol. 14] IN UNITED STATES DISTRICT COURT

DEFENDANT'S PROPOSED INSTRUCTION RE ENTRAPMENT

Entrapment. Refused as covered.

The defense has attempted to show that the defendant was entrapped into committing the offenses charged in the indictment. Entrapment is a defense which, if, you find it to be established under the rest of my instructions, entitles the defendant to a verdict of not guilty. In fact, if you find that the defendant was entrapped, you must return a verdict of not guilty and I hereby instruct you to do so.

Entrapment means that the scheme of the crime originated in the mind or minds of the government agent or government informants and that the defendant not having a previous intention to commit offenses of the kind here involved, was induced to engage in the course of such criminal activity by government agents. Entrapment is not established merely by a showing that the government agent asked the defendant to secure narcotic drugs. For if the defendant was willing to commit the offense in any event, then the Government's request cannot be said to be the inducement. But unless the Government has established that the defendant was ready and willing to engage in the traffic charged prior to the request by the Government agent, the defense of entrapment is applicable. ~~For the law does not permit the Government to approach a citizen who does not contemplate committing an offense and entice that citizen into violating the law. Under these circumstances a defendant must be acquitted.~~

[fols. 15-21] In the present case there are four separate offenses charged. If you find that the defendant was entrapped into committing the first offense, then you must return a verdict of not guilty as to that count. If you further find that the four separate sales charged all stemmed from the initial conversations with the Government agent and were part of a common scheme then you must acquit the defendant on all counts. If on the other hand you find no entrapment as to the first sale, then the defendant is shown to have been ready and willing to commit these offenses and there can be no defense of entrapment as to the last three counts.

Filed and endorsed Aug. 5, 1958.

[fol. 22] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 26,878-CR. 5 Cts. (Count I heretofore disposed of)

UNITED STATES OF AMERICA,

v.

LEONARD SALDANA

JUDGMENT AND COMMITMENT—August 18, 1958

Age 34

On this 18th day of August, 1958 came the attorney for the government and the defendant appeared in person and by Stephen Reinhardt, his counsel,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and verdict of guilty of the offense of knowingly and unlawfully selling and facilitating the sale of heroin, a narcotic drug, which said defendant then and there well knew had been imported into the United States contrary to law, and in violation of Section 174 of Title 21, United States Code, as charged Cts. II, III, IV & V of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten (10) years on Count V; five (5) years on Count IV, to run con-
[fol. 23] secutive to and not concurrent with the sentence imposed on Count V; five (5) years on Count III, to run consecutive to and not concurrent with the sentences imposed on Counts IV and V, or a total of twenty (20) years; imposition of sentence on Count II is suspended, and the defendant is placed on probation for the period of five (5) years to begin after release from service of sentences imposed on Counts III, IV and V, on condition that he will not violate any law, and will report to the Probation Officer

of the District of his residence every thirty (30) days, unless excused therefrom in writing.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Peirson M. Hall, United States District Judge.

Filed and endorsed August 18, 1958.

[fol. 24] In United States District Court for the Southern District of California, Central Division

No. 26,878-Crim. 5 Cts. Ct. 1 htf, disposed of.

United States of America,

v.

Leonard Saldana

Corrected Judgment and Commitment—August 25, 1958

Heretofore on the 18th day of August, 1958, came the attorney for the government and the defendant appeared in person and by Stephen Reinhart, his counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and verdict of guilty of the offense of knowingly and unlawfully selling and facilitating the sale of heroin, a narcotic drug, which said defendant then and there well knew had been imported into the United States contrary to law, and in violation of Sec. 174 of Title 21, United States Code, as charged in counts 2, 3, 4, and 5 of Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten (10)

years on Count V; five (5) years on count IV, to run consecutive to and not concurrent with the sentence imposed [fol. 25] on count V; five (5) years on count III, to run consecutive to and not concurrent with the sentences imposed on counts IV, and V, or a total of twenty (20) years; imposition of sentence on count II is suspended, and defendant is placed on probation for the period of five (5) years to begin after release from service of sentence imposed on counts III, IV, and V. Now on this 25th day of August, 1958, came the U.S. Attorney, and the defendant appeared in person and by Stephen Reinhart, his counsel,

It Is Adjudged that the judgment and sentence imposed on count II is vacated and set aside, and the defendant is sentenced to the custody of the Attorney General for a period of five (5) years on count II to run concurrent with and not consecutive to the sentence heretofore imposed on Count III.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Peirson M. Hall, United States District Judge.

Filed and endorsed August 25, 1958.

[fol. 26] In United States District Court for the Southern District of California, Central Division

[Title omitted]

Notice of Appeal—Filed August 25, 1958

Name and address of appellant:

Leonard Saldana, 445 South McBride Street, Los Angeles, California.

Name and address of appellant's attorney:

Stephen Reinhardt, 433 South Spring Street, Los Angeles, California.

Offense:

Section 174 of Title 21 of the United States Code. It [fols. 27-36] is charged that defendant knowingly and unlawfully sold and facilitated the sale to Jayme Lienanan

of certain amounts of heroin, a narcotic drug which as the defendant then and there well knew had been imported into the United States of America contrary to law.

Concise statement of judgment or order:

Judgement of conviction dated August 18, 1958 and August 25, 1958 under Counts Two, Three, Four and Five of the indictment. Defendant sentenced to ten years on Count Five, five years on Count Four, five years on Count Three, each and every sentence to run consecutively and not concurrently. Defendant also sentenced to five years on Count Two to run concurrently with the sentence on Count Three. Defendant is now confined in the Los Angeles County Jail.

I, the above named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judgment.

/s/ Leonard Saldana, Stephen Reinhardt, Attorney for Appellant, Leonard Saldana.

Dated: August 25, 1958.

Filed and endorsed August 25, 1958.

[fol. 1] IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

Honorable Thurmond Clarke, Judge Presiding

No. 26,878—Criminal

UNITED STATES OF AMERICA, Plaintiff,

vs.

ALBERT ARROYO PALOMINO, LEONARD SALDANA, Defendants

Reporters' Transcript of Proceedings on Arraignment and Plea—June 16, 1958

APPEARANCES:

Attorneys for Plaintiff, United States of America: Laughlin E. Waters, United States Attorney, Lloyd F. Dunn, Assistant United States Attorney, Chief, Criminal Division, by T. Conrad Judd, Assistant United States Attorney, 600 Federal Building, Los Angeles 12, California, Telephone: MAdison 5-7411;

[fol. 2] Attorney for Defendant, Albert Palomino: Jack Tenner, 6535 Wilshire Boulevard, Los Angeles 48, California, Telephone: Olive 3-5141;

Counsel for Defendant, Leonard Saldana: Stephen Reinhardt, 433 South Spring Street, Los Angeles 13, California, Telephone: MAdison 4-2611.

[fol. 3] Los Angeles, California, Monday, June 16, 1958, 9:30 A.M.

(The court hears other matters.)

The Clerk: No. 3 on the calendar, case No. 26,878, United States of America vs. Albert Arroyo Palomino and Leonard Saldana.

Albert Arroyo Palomino, is that your full, true name, sir?

Defendant Palomino: Yes.

The Clerk: Is Leonard Saldana here?

Defendant Saldana: Yes.

Mr. Tenner: I am just appearing for the defendant Palomino.

The Clerk: For Palomino only?

Mr. Tenner: Yes.

The Clerk: Is that your full, true name, Leonard Saldana?

Defendant Saldana: Yes, it is.

The Clerk: You are informed that you are in the United States District Court; that an Indictment has been filed charging you with violation of the laws of the United States. Mr. Saldana, I hand you herewith a copy of the charges.

Mr. Tenner, you have received a copy of the charges, for Palomino.

Mr. Tenner: Yes, sir. I have.

[fol. 4] The Clerk: You are entitled to trial by a jury and to be represented by an attorney. Mr. Saldana, do you have an attorney?

Defendant Saldana: I haven't.

The Clerk: You have not?

Mr. Tenner: Speak up.

Defendant Saldana: I haven't got an attorney.

The Court: Do you want the court to appoint an attorney? You better have an attorney. I will appoint Stephen Reinhardt. You can go over there and talk to him.

Do you want to take the plea of the other defendant?

Mr. Tenner: We can take our plea right now.

The Court: All right.

Mr. Tenner: Waive reading of the Indictment.

The Court: What is the plea?

The Clerk: As to Count One, Mr. Palomino, what is your plea, sir?

Defendant Palomino: Not Guilty.

The Clerk: And as to Count Two?

Defendant Palomino: Not Guilty.

The Clerk: And as to Counts Three, Four and Five?

Defendant Palomino: Not Guilty.

The Clerk: All. Trial time?

Mr. Judd: Approximately two and a half days, your Honor.

The Court: Mr. Reinhardt, if you want to enter a Not [fol. 5] Guilty plea for the other defendant, we might as well. Come right around. Mr. Reinhardt is going to represent him. They are co-defendants, and we will have the Not Guilty pleas taken of the other defendant, Saldana.

The Clerk: Mr. Saldana, what is your plea to all five Counts, sir?

Defendant Saldana: Not Guilty.

The Court: "Not Guilty." So just to save time, we have them together. They are joint defendants. Palomino has an attorney. Saldana has Mr. Reinhardt. Set it for trial say July 22nd?

The Clerk: At 10:00 A.M., before Judge Hall.

Mr. Tenner: Your Honor, July 22nd, I am engaged. The 23rd or 24th is agreeable.

The Court: How about July 15th, then?

Mr. Tenner: July 15th is satisfactory.

The Court: That is satisfactory. July 15th, then, 10:00 o'clock, in Judge Hall's.

Mr. Tenner: Your Honor, I would like to be heard briefly on reduction of bail.

The Court: All right. What is the bail now?

Mr. Tenner: Bail is now set at $20,000.

Mr. Judd: This is as to the defendant Palomino only, your Honor.

The Court: Yes.

[fol. 6] Mr. Tenner: In that matter, if your Honor please, the defendant has a bakery here in Los Angeles, he is a citizen, he is married and has two children. It is true that he has had a little difficulty, but the most recent of those instances was back about 10 years ago.

The Court: Drop the bail to $10,000.

Mr. Tenner: Thank you.

Mr. Judd: May the Government be heard, your Honor—

The Court: Yes.

Mr. Judd: Before this bail is reduced.

The Court: Yes.

Mr. Judd: This defendant has a prior——

The Court: Counsel stated that, yes.

Mr. Judd: What?

The Court: Counsel stated that he had a prior.

Mr. Judd: Prior narcotics, in other words, in the State.

The Court: Yes.

Mr. Judd: And this was eight years ago and he also has a prior conviction for rape, and the Government opposes the motion for any reduction of bail.

The Court: Well, you know my attitude. Bail is only to assure the appearance of the defendant, so I will grant the bail reduction to $10,000.

Mr. Tenner: Thank you.

Your Honor, may I also be heard briefly as to whether [fol. 7] this matter of necessity must be transferred to Judge Hall.

The Court: Well, I finish the criminal calendar on June 30th.

Mr. Tenner: Thank you, your Honor.

The Court: That is the reason for that.

Judge Harrison is to have the calendar July, August and September, but Judge Hall is going to hear it for him.

Mr. Tenner: Judge Hall. Thank you.

The Court: He is going to have a couple of visiting Judges here to help him.

[fol. 8] In the United States District Court, Southern District of California, Central Division

Honorable Thurmond Clarke, Judge Presiding

No. 26,878—Criminal

United States of America, Plaintiff,

vs.

Leonard Saldana, Defendant

Reporter's Transcript of Proceedings on Withdrawal of Guilty Plea—June 26, 1958

Appearances:

Attorneys for Plaintiff, United States of America: Laughlin E. Waters, United States Attorney, Lloyd F. Dunn, Assistant United States Attorney, Chief, Criminal Division, By: Thomas R. Sheridan, Assistant United States Attorney,

Attorney for Defendant Leonard Saldana: Stephen Reinhardt.

[fol. 9] Los Angeles, California, Thursday, June 26, 1958, 9:45 A.M.

(The court hears another matter)

The Clerk: Case No. 26,878, Leonard Saldana.

The Court: Yes.

Mr. Reinhardt: Your Honor, at this time the defendant would like to withdraw a Plea of Not Guilty and enter a plea of Guilty to Counts One and Two.

The Court: Yes. The Clerk may take the plea.

The Clerk: Leonard Saldana, is it your desire to withdraw your plea of Not Guilty to Counts One and Two and enter a further and different plea?

Defendant Saldana: Yes.

The Clerk: What is your plea to Count One?

Defendant Saldana: Guilty.

The Clerk: And what is your plea to Count Two?

Defendant Saldana: Guilty.

The Court: Mr. Miller (The Bailiff), wait a minute. I am trying to take a plea and I just cannot do it, for I can't hear whether they are saying nolo contendere or Not Guilty. They will have to talk out in the hall. Go ahead now. Let us start again. I don't know what you said.

Mr. Reinhardt: Your Honor, the defendant would like to withdraw his plea of Not Guilty to Counts One and Two and enter a plea of Guilty to those Counts.

[fol. 10] The Court: All right.

The Clerk: Mr. Saldana, is it your desire to withdraw your plea of Not Guilty to Counts One and Two and enter a further and different plea?

Defendant Saldana: Yes.

The Clerk: What is your plea to Count One?

Defendant Saldana: Guilty.

The Clerk: And to Count Two, what is your plea?

Defendant Saldana: Guilty.

The Court: Do you want to file an application?

Mr. Reinhardt: No, your Honor. May I speak on the matter of sentencing at this time?

The Court: Yes.

Mr. Reinhardt: This is a narcotics violation and no probation is authorized. In these cases, as your Honor knows, there is a minimum sentence of five years.

The Court: Yes.

Mr. Reinhardt: And as a result, any time the defendant serves between now and sentencing is time he cannot make up.

The Court: Yes.

Mr. Reinhardt: As he gets no credit for that time.

The Court: Would you like to have me make it five years on each Count and to run concurrently and waive time right now?

Mr. Reinhardt: Yes.

[fol. 11] The Court: Mr. Sheridan?

Mr. Sheridan: Your Honor, if I may be heard on just one point.

The Court: Yes.

Mr. Sheridan: (Continuing) Not on his sentence, but on the fact that in this case there is a co-defendant and I would suggest that policywise, where there is another defendant who is going to stand trial, that it is usually advisable to not sentence one defendant first, in that we don't know what his intentions are and we don't feel it is permissible to pass sentence now.

The Court: Well, he wants me to pass sentence. When is the other defendant set for trial?

Mr. Sheridan: He is set for trial on July 15th, your Honor. So I would suggest that you sentence this defendant here on July 21st, which would be fine, in that we never can tell that he is going to appear as a witness.

The Court: I see. They are afraid that he might get on the stand at the other trial and take all the blame.

Mr. Reinhardt: Your Honor, on that subject, may I say, in the first place, it doesn't seem to me quite correct for the Government to make a man serve an extra month in order to insure what his testimony will be at a subsequent trial. There is a perjury statute and if Mr. Saldana perjures himself, the court at that time can act, and he has told me [fol. 12] that he does not intend to testify for the co-defendant.

The Court: Well, I will keep my word and I will make it five years on each Count, to run concurrently, on the 21st, and we will have him here on the 21st at——

Mr. Sheridan: 2:00.

The Court: The 21st at 2:00 o'clock.

Mr. Sheridan: At 2:00 o'clock.

The Court: At 2:00 o'clock.

Mr. Reinhardt: At 2:00 o'clock.

Mr. Sheridan: Thank you.

The Court: I will keep my word with you at that time. It will be five years on each Count, to run concurrently. That is the minimum. I don't think you can beat that.

Mr. Reinhardt: Thank you.

The Clerk: Do you want a Probation Report then, your Honor?

The Court: No. There is no use to have a Probation Report, counsel, because of the fact that he can't get probation anyway.

Mr. Reinhardt: Yes; we will waive that.

The Court: Yes. All right.

(A short intermission.)

The Clerk: Just a minute. Mr. Sheridan, Mr. Saldana is charged in Counts Three, Four and Five.

Mr. Sheridan: Well, hold those.

[fol. 13] The Court: We are going to hold those, hold disposition until July 21st at 2:00 p.m.

Mr. Sheridan: Hold those until July 21st.

The Court: Yes, we will hold the disposition of the other Counts.

Mr. Sheridan: Yes.

[fol. 14] IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

Honorable Peirson M. Hall, Judge Presiding

No. 26,878 Criminal

UNITED STATES OF AMERICA, Plaintiff,

v.

LEONARD SALDANA, Defendant

REPORTER'S TRANSCRIPT OF PROCEEDINGS ON SENTENCE—July 21, 1958

APPEARANCES:

For the Plaintiff: Laughlin E. Waters, United States Attorney, Los Angeles 12, California; by Robert D. Hornbaker, Assistant United States Attorney.

For the Defendant: No appearance.

[fol. 15] Los Angeles, California; Monday, July 21, 1958; 2:00 P.M.

The Court: Any ex parte matters?

The Clerk: No, your Honor.

The Court: Call the calendar.

The Clerk: Item No. 28. Case No. 26,878, United States v. Leonard Saldana.

The Court: Is the defendant's counsel present?

Mr. Hornbaker: No, your Honor. I understand he will not be present.

The Court: Why isn't your lawyer here, Mr. Saldana?

The Defendant: He had another case, I believe, in another court.

The Court: This matter was put over until today for sentence after a plea of guilty by you before Judge Clarke. The case has been transferred to my calendar, and because the other defendant has pleaded not guilty and will be tried before me, for that reason your plea is transferred to this calendar.

The case of your co-defendant is set for July 29th. It may be that you will wish to withdraw your plea of guilty and go to trial.

Have you talked to your lawyer about it?

The Defendant: Can we get a continuance of a week?

The Court: No. I will continue the matter until tomorrow [fol. 16] morning, and in the meantime you can have your lawyer get a hold of you today.

The Defendant: Thank you, your Honor.

[fol. 17] IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

Honorable Peirson M. Hall, Judge Presiding

No. 26,878 Criminal

UNITED STATES OF AMERICA, Plaintiff,

v.

LEONARD SALDANA, Defendant

REPORTER'S TRANSCRIPT OF PROCEEDINGS ON SENTENCE—July 22, 1858

APPEARANCES:

For the Plaintiff: Laughlin E. Waters, United States Attorney, Los Angeles 12, California; by Thomas R. Sheridan, Assistant United States Attorney.

For the Defendant: No appearance.

[fol. 18] Los Angeles, California; Tuesday, July 22, 1958; 10:00 A.M.

(Other court matters.)

The Clerk: Case No. 26,878, United States v. Leonard Saldana.

Mr. Sheridan: On this case, your Honor, it was on yesterday for sentence and you stated you wanted it brought up this morning and for his attorney to come in with him.

I contacted his attorney and didn't get in to see his attorney until after 9:00 o'clock this morning, and he reminded me—and I think it may have slipped your mind yesterday—that both his sentence and the proceedings in the other matter were to be continued.

His attorney, a man by the name of Stephen Reinhardt, spoke to you very briefly about this case and you informed us that you were going to continue the sentence on this case until the co-defendant, Albert Palamino, came to trial, that he is due for trial on the 29th of this month, and at that time Mr. Reinhardt asked you if there is any need for him to appear in court on Monday and have you continue the sentence, as he is a court appointed attorney, and you gave him that permission, that he did not need to be in court.

The Court: My purpose in continuing the matter until today was to give the defendant an opportunity to consult with his lawyer to see if he still wants to plead guilty.

[fol. 19] Mr. Sheridan: That is going on, your Honor, with the other co-defendant as well, and I think there is something going ahead.

The Court: Very well. The matter of sentence is continued to and set for July 29th at 10:00 a.m. in this courtroom.

Mr. Sheridan: Thank you.

[fol. 20] IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

Honorable Peirson M. Hall, Judge Presiding

No. 26,878-Criminal

UNITED STATES OF AMERICA, Plaintiff,

v.

ALBERT ARROYO PALOMINO and LEONARD SALDANA, Defendants

REPORTER'S TRANSCRIPT OF PROCEEDINGS ON VACATION OF PLEA —July 29, 1958

[fol. 21] APPEARANCES:

For the Plaintiff: Laughlin E. Waters, United States Attorney, by: Thomas R. Sheridan, Assistant United States Attorney.

For the Defendant, Albert Arroyo Palomino: (The de-

fendant is not present, but he is represented by counsel:) Jack Tenner, Esq., 6535 Wilshire Boulevard, Los Angeles 48, California.

For the Defendant, Leonard Saldana: (The defendant is present in person and is represented by counsel:) Stephen Reinhardt, Esq., 433 South Spring Street, Los Angeles 13, California.

[fol. 22-23] Los Angeles, California, Tuesday, July 29, 1958, 10:00 A.M.

The Court: We will call the trial calendar first. If there are to be any changes of plea, counsel will announce that, and I will defer that until after I complete the call of the trial calendar.

The Clerk: No. 26,878, United States versus Albert Arroyo Palomino and Leonard Saldana.

Mr. Tenner: In that matter, if your Honor please, I wish to call the attention of the court that I think the defendant has absented himself from the jurisdiction of this court.

This matter was originally set for the 15th of this month. As your Honor may or may not recall, prior to that time I appeared before this court asking for a continuance. The matter was continued until today. I contacted the Palomino family to give them the new date.

I have been unable to locate the defendant. The wife has indicated that she does not know the present whereabouts. Since that information became known to me, I have made that information available to the office of the United States Attorney.

Since that time neither I, nor my office, nor any of his family have been contacted by Mr. Palomino.

The Court: Go ahead.

[fol. 24] Mr. Tenner: I do feel this, that there is probably no reason why this court should not forfeit the bail today. I would like to call the court's attention, however, to another matter, and that is, that if your Honor were to do that today, and forfeit the bail, the only ones who would really suffer would be the defendant's wife and his four children, because what is up as security for the bail is their life savings, $4,000, and their property. On the other hand, I don't believe——

The Court: I don't know why I should have any greater concern for this man's wife and his children than he did. If he has absented himself, and has absconded and become a fugitive, why, he knew that his bail would be forfeited, and he must have known if it was their life's savings, why,——

Mr. Tenner: What I have in mind, and what I would like to suggest that the court consider, would be perhaps to take a continuance for a period of time, and during that period of time your Honor could increase the bail, so that we could get a warrant out for his arrest. If you were to follow that procedure, I don't think anyone would suffer, the court would retain jurisdiction, we would not be giving the defendant any additional personal consideration, and if he is found during that period of time, we would save what is up with the bonding company, and if we didn't find him, at that time your Honor, I would suggest, could forfeit the [fol. 25] bail. I don't think anyone could suffer from that kind of an arrangement.

The Court: No, the court cannot tolerate the flight in these cases. We have ten cases now where bonds have been set from $10,000 to $30,000 in narcotics cases, and the defendants are fugitives. They have either fled and forfeited their bail, or they have become fugitives upon learning of the indictment. Not only will I not tolerate that, but I will forthwith forfeit the bond, and direct the United States Attorney, in their endeavors to find him, if they do find him, and find that he has violated the law concerning flight; that they be instructed to present that matter to the Grand Jury for re-indictment.

Mr. Tenner: May I simply call one other matter to your Honor's attention, for the sake of the record, and indicate that when the motion for continuance was granted, at my request, the defendant was not present, and did not know of this date, because I had been unable to get it to him.

In other words, that was a motion granted to me in the presence of the United States Attorney, and the defendant was not present in court, and was not ordered back. I state that for your Honor's consideration, and for the sake of the record, without at this time trying to argue the significance of it.

The Court: The order setting the case for trial is vacated.

due to the absence of the defendant, and the bond is for-
[fol. 26] feited. Counsel for the Government will prepare an appropriate judgment of forfeiture.

Mr. Sheridan: Yes, your Honor.

The Court: And a bench warrant to issue.

Mr. Sheridan: There is a co-defendant in this case, your Honor. I don't know if you wish to dispose of that matter now. He is present.

The Court: Is it just set for trial as to him, too?

Mr. Sheridan: No, he entered a plea before Judge Clarke, your Honor.

The Clerk: He is here for sentence, your Honor.

Mr. Sheridan: And he had a chance to appear when the defendant Palomino was still going to trial.

The Court: Is the defendant present? Let me see the file.

(The file was handed to the court.)

The Court: Leonard Saldana?

Mr. Reinhardt: Yes, your Honor, the defendant is present.

The Court: Oh, the defendant is present.

Mr. Reinhardt: Your Honor, may I be heard on the matter of sentence?

The Court: Well, I am not going to sentence him now.

Mr. Reinhardt: No.

The Court: Has the matter been referred to the probation department?

[fol. 27] Mr. Reinhardt: Your Honor, in connection with that, I would like to point out that your Honor had this case transferred here because your Honor said you did not want to take a part of a case. In view of the fact that the co-defendant will no longer be tried before your Honor,——

The Court: I don't know whether he will or not.

Mr. Reinhardt: I will explain what happened originally, your Honor. Mr. Saldana was brought before Judge Clarke, and he pleaded guilty, and he asked to be sentenced at that time. Judge Clarke then told the co-defendant that he would sentence him, and that he would sentence him to five years.

At that point, your Honor, the United States Attorney objected on the ground that Mr. Saldana should not be

sentenced before the trial of the co-defendant. Judge Clarke then agreed to withhold the sentence until after the trial of the co-defendant. However, at that time he announced that he would sentence him.

The Court: Did he plead guilty to all five counts?

Mr. Reinhardt: No, your Honor. He pleaded guilty to two counts.

The Court: He pleaded guilty to two counts?

Mr. Reinhardt: Yes, sir.

The Court: I think perhaps in the interests of justice I might vacate his plea of guilty to the two counts, enter a plea of not guilty on behalf of the defendant, and set the [fol. 28] matter down for trial again.

Mr. Reinhardt: Your Honor, may I suggest again, in the interests of justice, that he did plead guilty before the court, and he was told at that time that the sentence would have been made, but he was held in jail merely for the convenience of the court for another trial, and was told the sentence would be five years.

The Court: Apparently it smacks too much of having the appearance of a bargain.

Mr. Reinhardt: No, your Honor.

The Court: That if he would plead guilty, he would get five years.

Mr. Reinhardt: No, your Honor. He pleaded guilty——

The Court: Here he is charged in five counts.

The Clerk: He pleaded guilty to Counts 1 and 2.

The Court: But he is charged in all five counts, involving——

Mr. Sheridan: A total of about 15 ounces, your Honor.

The Court: 15 ounces of heroin.

Mr. Reinhardt: Your Honor, if I may just state, there was no bargain. This was done in open court.

The Court: I didn't say it was a bargain. I said it smacks of the appearance of a bargain.

Mr. Reinhardt: I hope that the appearance will not defeat what appears to me to be the interests of justice in this [fol. 29] case. I know it is rather unusual that the defendant was told what his sentence would be.

The Court: Can the defendant Saldana go to trial?

Mr. Reinhardt: Your Honor, I can't advise the defendant to go to trial. The defendant has told me that his proper

plea is a guilty plea. I don't want him to go to trial merely for litigation.

On the other hand, I think Mr. Sheridan will bear me out: What happened is just as I told you, your Honor, in Judge Clarke's court, that he really intended to sentence him at that time, and it was for the convenience of the court that it was delayed.

Mr. Sheridan: That much I do agree to, your Honor. The case was called on June 26th before Judge Clarke at 10:00 o'clock, and at the time he called it, the defendant Saldana did plead guilty to Counts 1 and 2. At that time Judge Clarke asked if he wanted to waive the probation report, and the defendant stated he did, and at that time Judge Clarke was about to sentence him. Then at that time I did object, prior to the sentence, and Judge Clarke said he would continue the sentence until disposition was made of the Palomino trial, and Judge Clarke did at that time indicate to the defendant what his sentence would be when he came back, and after that, of course, the defendant was transferred before yourself.

The Court: The matter is before me now, and I think in [fol. 30] view of what both counsel have stated, that this defendant here deserves a trial. I will vacate his plea of guilty to Counts 1 and 2, and enter on his behalf a plea of not guilty to all counts of the indictment. He had entered a plea of not guilty to the other counts?

Mr. Sheridan: That is correct, your Honor.

The Court: I can set it for trial next week. The man has been in jail now since June; isn't that right?

Mr. Sheridan: Since early in June, that is right.

The Court: How long have you been in jail?

Mr. Reinhardt: Since June.

The Court: Since June. He ought to be tried.

Mr. Reinhardt: Well, your Honor, I agree that it should be disposed of.

The Court: I can set it for trial, and it will be tried next week. I will set it for trial on August 5th, at 10:00 a.m. in this court.

[fol. 30-a] In the United States District Court, Southern District of California, Central Division

Honorable Peirson M. Hall, Judge Presiding

No. 26,878 Criminal

United States of America, Plaintiff,

v.

Leonard Saldana, Defendant

Reporter's Transcript of Proceedings on Motion to Transfer and Plea—August 1, 1958

Appearances:

For the Plaintiff: Laughlin E. Waters, United States Attorney, by Thomas R. Sheridan, Assistant United States Attorney.

For the Defendant: Shephen Reinhardt.

Reported by: Jane Horswell.

[fol. 31] Los Angeles, California. Friday, August 1, 1958. 10:00 A.M.

The Clerk: Case No. 26878. United States versus Leonard Saldana. Number 1 on the calendar.

The Court: Do you have the file?

The Clerk: No, sir, I do not. Do you have a copy of the indictment?

Mr. Sheridan: Yes, I do.

The Court: This is a plea as to the motion as to Saldana?

Mr. Reinhardt: Yes, your Honor.

The Court: Is this case set for trial?

Mr. Reinhardt: Yes, it is, your Honor. May I explain a little bit to your Honor the reason for this motion this morning?

The Court: Yes.

Mr. Reinhardt: At my request, the United States Attorney has arranged that this matter, a change of plea of the defendant, be placed on the calendar.

However, before your Honor begins the proceedings, I would like to ask for a few moments to request your

Honor to reconsider a motion I made in this court on Tuesday, which your Honor then denied.

May I begin by saying I was appointed in this case by the Court. At the time of the appointment, it was at the defendant's arraignment. Judge Clarke suggested I plead [fol. 32] the defendant not guilty, because his co-defendant had pleaded not guilty.

I did that, and then I talked to the defendant, and when I talked to him fully, he explained to me that he did desire to plead guilty, and has maintained that position ever since.

I went to the United States Attorney at that point, when I learned the defendant wanted to plead guilty, Mr. Sheridan, and was told that the government would accept a plea to Counts I and II, which I understand is fairly standard practice, not only here, but throughout the country, at the time of trial; if there were more Counts, you will accept a plea to a lesser number.

The Court: There is nothing saved to the government here, because the government has to try Palomino.

Mr. Reinhardt: Palomino has jumped the jurisdiction.

Mr. Sheridan: He is the defendant who failed to show, and whose bail you forfeited.

Mr. Reinhardt: It is possible that he will be found, and the government may have to proceed to trial. In any event, a guilty plea to two counts does permit a maximum sentence of forty years, as your Honor knows.

I would like to indicate to your Honor that not only was there no deal made in this case, but your Honor suggested [fol. 33] the other day it had the appearance of a deal, and I want to show it was the normal procedure. At that time it happened to be Judge Clarke who took the plea. I had not seen Judge Clarke before, and I did not make arrangements to have the plea put on the calendar. The U.S. Attorney did it at my request. It was then in open court that Saldana changed his plea to guilty.

I then suggested immediate sentence, since I felt, since there is a flat minimum, any parole served would be dead time. Judge Clarke agreed at that time that he would sentence the defendant that morning, and said he would sentence him to five years. He fixed the sentence at that time.

Mr. Sheridan then objected to immediate sentence, because there was a co-defendant, and Mr. Sheridan's theory was that Saldana should not be sentenced because he might then come back and testify in favor of the co-defendant.

I objected that the defendant should not be held in jail awaiting sentence for the convenience of the government, because there was a perjury statute available in the event he did perjure himself, and that was the solution, instead of holding someone in jail. But I was overruled by Judge Clarke.

However, when he overruled me, he stated in open court [fol. 34] he would sentence the defendant to five years when he returned him for sentencing.

That was not the promise of an individual, your Honor, that was the promise of the United States District Court. At least that is the way it would appear to the defendant who came before the Court and was told that would be his sentence.

I realize you cannot be and should not be bound by a statement of one of your fellow judges. And I would hesitate to even suggest to you that at the time of the sentence that you should be bound by that. However, I would want to avoid being required to make that request of you by asking you at this time if in view of the fact that this case did arise in that manner, and that Judge Clarke did in open court make that promise to the defendant, or make that statement of what the sentence was, and the defendant has since that time relied on that, and as I understood that that was to be his sentence, if, in view of that, your Honor would consider transferring this matter back to Judge Clarke, so that the defendant could once more plead before him.

The Court: I do not consider myself bound by any statement made by Judge Clarke.

Mr. Reinhardt: No. I understand that.

The Court: And I can see no reason for transferring this back to Judge Clarke, because it would be merely [fol. 34-a] in my opinion, confirmation of what appears to have all the earmarks of a deal.

In other words, the defendant is relying upon the fact that Judge Clarke said he was going to give him five years, so he has an understanding on his part that if, as and when, because he pleads guilty, he is going to get five

years, which might be another and different sentence than if he were tried and found guilty.

Mr. Reinhardt: No, your Honor, no statement was made until after the defendant pleaded guilty. He pleaded guilty before any discussion of his sentence. The Court then indicated and told him twice that this was his sentence, and that it would be delayed for the convenience of the Government.

The Court: All right, what is your motion now?

Mr. Reinhardt: My motion is to ask your Honor at this point to transfer this matter back to Judge Clarke.

The Court: That motion is denied.

Mr. Reinhardt: In that event, your Honor, we would now like to plead guilty to Counts I and II.

The Court: I would not accept a plea of guilty to Counts I and II. As indicated before, there was almost 15 ounces involved in the alleged violation. If this defendant is guilty, he ought to be tried and have a jury determine his guilt.

[fol. 34-b] Mr. Reinhardt: Your Honor, I'm sorry. This is my first case. In the second place, I was appointed by the Court.

The Court: Under the law, a plea of guilty must be accepted by the Judge, so I decline to accept the plea of guilty. That being the case, there is nothing to do but for the Court to enter a plea of not guilty, and set the case for trial.

When is it set?

Mr. Sheridan: I believe you set it for August the 5th, your Honor.

The Court: That is next Tuesday.

Mr. Sheridan: Yes, your Honor. August 5th at ten o'clock.

Your Honor, would you for my sake clarify one point as to the co-defendant. In this case defendant Palomino, who on Monday of this week you forfeited the bond or the bail of $10,000.00, and ordered a Bench Warrant issue, and at that time you ordered the government to prepare an order or judgment.

I searched around through the files, and I am at a loss as to what type of order or judgment you had in mind at that time.

The Court: Let us call it a *scire facias*.

Mr. Sheridan: Whatever that means.

[fol. 34-c] The Court: You will have the form, and here is your copy of the indictment. Was his bond ten?

Mr. Sheridan: It was originally twenty. It had been reduced to ten by another Court, and you forfeited the ten.

The Court: You will be prepared to go to trial Tuesday?

Mr. Sheridan: I will be prepared.

[fol. 35-36] In the United States District Court, Southern District of California, Central Division

Honorable Peirson M. Hall, Judge Presiding

No. 26,878 Crim.

United States of America, plaintiff,

vs.

Leonard Saldana, defendant

Reporter's Transcript of Proceedings—August 5, 1958

Appearances:

For the Plaintiff: Laughlin E. Waters, United States Attorney; by Bruce A. Bevan, Assistant United States Attorney.

For the Defendant: Stephen Reinhardt.

[fols. 37-40] Los Angeles, California, Tuesday, August 5, 1958, 10:00 A. M.

(Other court matters.)

The Clerk: United States v. Leonard Saldana.

The Court: All right. The clerk will impanel the jury.

The record will show the defendant is present in person and by counsel.

Mr. Reinhardt: Your Honor, may we approach the bench?

The Court: Yes.

(Whereupon, the following proceedings were had at the bench:)

Mr. Reinhardt: Your Honor, I feel it is my duty to state once more for the record that the defendant objected to

the vacation of his plea of guilty, and he does not go to trial of his own choosing because the court has vacated his plea of guilty.

The Court: Well, your objection is stated for the record.

(Whereupon the following proceedings were had in open court:)

(Jury impaneled and sworn.)

* * * * * * *

[fol. 41] Jayne R. Lieuanan, called as a witness herein by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

* * * * * * *

[fol. 42] Direct examination.

By Mr. Bevan:

Q. What is your business or occupation, sir?

A. Treasury enforcement agent assigned to the Federal Bureau of Narcotics.

Q. How long have you been with the Treasury Department, sir?

A. Approximately two years.

Q. Were you then a Treasury agent on April 28th, of 1958?

A. I was.

Q. On that date did you have occasion to meet the defendant, Leonard Saldana?

A. I did.

Q. And where were you when you met him, sir?

A. 445 South McBride Street, East Los Angeles.

Q. And how did you get there?

A. On a Government vehicle.

[fol. 43] Q. At the time that you—Strike that.

Did anyone introduce you to Mr. Saldana?

A. Yes, sir.

Q. And who was that, sir?

A. Confidential informant.

Q. Now, did you have conversations with the defendant after your introduction?

A. I did.

Q. And the 445 McBride Street is the residence of whom, did you determine?

A. Leonard Saldana.

Q. Besides the confidential informant, was anyone else present with you at the time you held the conversations with the defendant on April 28, 1958?

A. No, sir.

Q. Please relate those conversations. What did you say to the defendant, and what did the defendant say to you?

A. As I was introduced to defendant Saldana, I was introduced as Salvador, Sal.

After an exchange of greetings, defendant Saldana asked, inquired from me how much I wanted to pick up. "Pick up" means to purchase.

At that time I inquired from him how much the ounce would cost. He then told me that it would cost $200.

He then asked me how much heroin I wanted. I then told [fol. 44] him that I had enough for two ounces, $400.

He then told me to return at approximately 8:00 p. m. I'd say, prior to that, he then told me, "You wait in the car. I'm going back into the house and call my connection. At that time I'll return and tell you what time you have to return to pick up the stuff."

He went inside the house, and shortly thereafter I observed him making a telephone call.

He then returned, after making the phone call, returned to me and told me, "Come back at 8:00." I then departed——

The Court: Pardon?

The Witness: "Come back at 8:00 o'clock here."

The Court: I see.

The Witness: I then departed with the confidential informant.

By Mr. Bevan:

Q. Did you return later in the evening, Mr. Lienanan?

A. At approximately 7:50 p. m., I returned to 445 South McBride Street, East Los Angeles.

Q. Were you with the confidential informant at that time?

A. I was.

Q. What happened after you arrived there?

A. As I parked the car in front of the residence of the defendant Saldana, Saldana opened the front door and [fol. 45] motioned to us come in (indicating).

We then left the Government car and walked inside the house.

He then told us to sit down, and as the confidential informant and myself sat down in the living room, defendant Saldana left the living room and entered the bedroom.

Approximately a minute elapsed. He then returned to the living room and laid down—took from a handkerchief two rubber contraceptives containing white substance, which he laid down on the coffee table.

I then picked it up, opened the contraceptive, and tried to feel the substance, and when it smelled acidic to me, I then determined that it could very well be heroin.

I then took the two rubber contraceptives, and I handed defendant Saldana $400 in official advance funds, U. S. Government money.

Q. Did you have any further conversation with the defendant at this time?

A. At that time, as I was leaving the house, there was a knock, and an unidentified male Mexican entered the residence, and I left.

Saldana then followed me and the special employee to the car. He then inquired from me when I would be back to pick up some more.

I then told him that I was going to call him in a day or [fols. 46-57] so. I then departed after that.

Q. Did you obtain his telephone number at this time?

A. Yes, sir. He gave the telephone number to me, which I wrote down on a piece of paper.

Q. Just to avoid any misunderstanding, when you used the term "special employee" as you did, what did you mean by that, Mr. Licuanan?

A. Confidential informant.

Q. And by "special employee" you do not mean any employee of the Government, actual employee of the Government, do you, but that's just a term used to describe

confidential informants insofar as the Federal Bureau of Narcotics is concerned?

A. That's right, sir.

The Court: Do you wish to withdraw this witness for the purpose of identifying certain objects?

Mr. Bevan: Yes, your Honor, with the court's permission, I do.

[fol. 58-60] JAYME R. LICUANAN, resumed the stand as a witness on behalf of the plaintiff and, having been previously duly sworn, testified further as follows:

Direct Examination (continued)

[fol 61] By Mr. Bevan:

Q. Following and after April 28th, did you ever see the defendant again?

A. Yes, sir.

Q. And when was the next time that you saw him?

A. May 7, 1958.

Q. Had you previously conversed with him before that time and after April 28, 1958?

A. Yes, sir; approximately 8:55 p.m. on May 6, 1958, I called the defendant over the telephone.

Q. Well, you placed a telephone call to the number which previously was given you?

A. That's right, sir.

Q. And did you hear a voice answer on the other end?

A. Yes, sir.

Q. What did you say at the time you first spoke into the phone?

A. When the voice answered on the other end of the telephone, I identified myself, and I said, "This is—esta Sal." I was talking to the defendant in Spanish.

The Court: Did you recognize the defendant's voice?

The Witness: I did, sir.

By Mr. Bevan:

Q. What was the conversation that you held then with the defendant?

A. The defendant recognized my voice and said, "Yes, Sal."

[fol. 62] I said, "Leonard." He said, "Yes."

"I'd like to pick up a piece tomorrow."

He said, "Anda le pues"—that means, "It's O.K." He said, "Come around about 5:00 p.m. after I get out of work."

Q. Are you familiar, Mr. Lieuanan, with the terms that are employed in the narcotic trade?

A. Yes, sir.

Q. And for how long have you been familiar with such terms?

A. Since I joined the Bureau.

Q. Now, does the word "piece" have some particular meaning in that trade?

A. Yes, sir.

Q. What does it mean?

A. It refers to one ounce of heroin.

Q. Was that about the substance of your telephone conversation——

A. That's right, sir.

Q. —on May 6th?

And what time of day did you meet the defendant on May 7, 1958?

A. I went to his residence at about 5:00 o'clock p.m. He was not home.

I went around the block, returned to 445 South McBride Street. I parked in there, and shortly thereafter, at [fol. 63] approximately five minutes after five, I observed the defendant arrive in a 1951—I believe it was—Chevrolet.

He then parked the car in front of the Government vehicle where I was in. He got out of the car and walked to my car, and at this time he said, "Come back at 6:00 o'clock. I'll have to call my man. He hasn't arrived yet." I then departed.

At 6:00 o'clock I called him over the telephone.

He then stated to me that the man—referring to the source of supply—had not arrived yet. He then told me to come over to his house and wait for the man.

I told him I was having dinner, and I would see him in about an hour.

At approximately 6:55 p.m., on May 7, 1958, I returned to 445 South McBride Street. I was invited by the defendant into the living room.

I sat down for approximately 10 or 15 minutes, and while seated in the living room I heard a car parked in front of the house.

Q. Before hearing that car, did you have any conversation with Mr. Saldana?

A. Except that—yes, sir—he only told me that he was sorry that the man was not there yet; he was sorry that he hung me up.

And then we had some other conversations which did not [fol. 64] pertain to narcotics.

Q. What happened after you heard the car drive up?

A. When I heard the car stop in front of 445 South McBride Street, defendant Saldana was then seated on the couch, and he said—he looked in the window, and he said, "Wait a while; here's the man," when he got out of the couch and got out of the house, walked to the station wagon. As he was walking towards the car, I looked in the window and I saw defendant Saldana get in the station wagon, 1958 Ford station wagon, where he remained for approximately a minute.

He then returned, got out of the station wagon and returned to the house, and laid Exhibit No. 2-A on the table.

Q. By "2-A," referring to the court Exhibit 2-A before you?

A. That's right, sir, this exhibit in here.

Q. Yes. Proceed.

A. When he laid this on the table, I picked it up and I opened the contraceptive and I smelled the contents, and I smelled it had acidic odor in it.

I then paid him $200. And then I started to leave, and he asked me, he says, "Sal, how much more do you want? When are you going to come back?" He said, "I can supply you all you want."

I then told him that I was going to call him back in a day or so. I then departed.

[fol. 65] I left the house, got in the Government car, and then I proceeded to the East Los Angeles Sheriff's substation, carrying Exhibit No. 2.

The Court: You were alone?

The Witness: By myself, yes, sir. I was followed by——
The Court: On this entire occasion?
The Witness: That's right, sir.
The Court: That is, you entered his house alone?
The Witness: By myself, yes, sir.
I was then on my way to the Sheriff's substation, and I was followed by the other covering agents.

. . . . . .

[fol. 66] By Mr. Bevan:

Q. After the events on May 7th that you have testified to, did you ever have any further conversation with the defendant Saldana?

[fol. 67] A. Yes, sir. I called him on two occasions. The date, I'm not too clear. I don't remember. At that time I was working on some other case. But each time that I called him I was telling him that I was not ready to make any purchases because I haven't disposed of any of my—of the heroin that I purchased from him previously.

Q. Did you later see the defendant in person?

A. Yes, sir.

Q. When was that, Mr. Lieuanan?

A. On May the 13th, 1958, I went to 445 McBride Street at approximately 5:30 p.m., at which time I met the defendant. And he made—I got out of the house and was met by defendant on the sidewalk.

Q. You said "got out of the house."

A. I got out of the car.

Q. I see.

A. And defendant got out of his house, and we met on the sidewalk.

I then told him that I wanted to pick up a piece.

He then told me to wait in the car, and he got back in the house, made the telephone call.

He then returned to me shortly thereafter, approximately a minute or a minute and a half, and told me that the man was not home, but that the man might be in one of the motorcycle shops at the corner of Atlantic and Whittier, I believe [fol. 68] it was, in East Los Angeles.

He then asked me to drive him over to the corner of Atlantic and Whittier.

Q. Did you do so?

A. Yes, sir. Defendant Saldana then got into the Government vehicle I was driving, and then we drove, proceeded to—we proceeded east on East Street towards Atlantic. We haven't—I think we drove for about five or six blocks when the defendant Saldana observed a motorcycle headed west on 6th Street. He then told me to park on the corner.

As the motorcycle got abreast us, going towards the west, he motioned to the rider of the motorcycle. The motorcycle then made a U turn and parked his motorcycle behind the Government car.

Saldana then left the Government vehicle and went, met the rider of the motorcycle. He talked to the rider, which later we identified as Albert Palomino, for approximately two or three minutes.

He then returned to the Government vehicle; the rider of the motorcycle left the area.

Saldana then told me to make a U turn. We went down to Ford Street, and then on Ford we went north towards Wabash and City Terrace, Wabash and City Terrace Boulevard—I believe it's a boulevard, isn't it?

As we got to the corner, to the intersection of Wabash [fol. 69] and City Terrace, defendant Saldana told me to park on the corner.

As we were parked on the corner, I observed Albert Palomino riding his motorcycle coming from City Terrace, headed west, I believe, the direction out there. He then saw our car parked on the corner, and he made a U turn and parked right behind the Government vehicle.

As the motorcycle was parking, stopping, Saldana left the Government car, and I looked back and I saw Albert Palomino pick up what later turned out to be Exhibit No. 3, and held it in his left hand. Saldana then walked towards the left side of the rider of the motorcycle and conversed with the rider for approximately two or three minutes. At this time I observed Palomino hand Saldana what later turned out to be Exhibit No. 3.

After Saldana took possession of Exhibit No. 3, he walked back to the Government vehicle, got in the Government vehicle, and, as I was making a U turn, the rider of the motorcycle left the area.

We then proceeded back to 445 South McBride Street, the residence of the defendant.

Q. What happened there?

A. As I got in front of the residence of defendant Saldana, I then handed him $200 of official advance funds.

He then gave me the——

[fol. 70] Q. You have something in your hand. What is that, sir?

A. He then gave me Exhibit No. 3.

The Court: 3-A.

The Witness: 3-A.

After he gave me Exhibit No. 3-A, I handed him $200. That's the way it went.

I then departed. He asked me—before I left, he asked me when I would be back to pick up some more stuff.

This time I told him that I was tired of having to come back every two or three days to pick up some stuff. I told him that next I would be back, I would order approximately five ounces—five pieces.

He said, he then told me, "Well, that's fine; that would be better."

So I then left the area and retained Exhibit No. 3 in my possession until I got back to the office of the Federal Bureau of Narcotics.

. . . . . .

[fol. 71] By Mr. Bevan:

Q. Did you have occasion to converse with the defendant after that date, which was May 13, 1958, Mr. Lieuanán?

A. I believe that, as I recall, right after I bought, I purchased Exhibit No. 3-A, I made a telephone call to defendant Saldana, at which time I told him that I had made a phone call to my money man—referring to the man that had the money—in San Francisco, at which time I told him that the man in San Francisco wanted to pick up about five pieces—referring to five ounces of heroin.

He then told me, "Well, whenever you're ready, give me a call, and I'll fix it up for you."

I then made an appointment with the defendant, I believe [fol. 72] it was two or three days after, I believe it was May the 16th, when I was supposed to see him.

I didn't see him at that date, but I sent him a wire from San Francisco, telling him that I was going to be back in

town, in Los Angeles, on May the 21st, 1958, approximately 4:00 p. m., to pick up, I believe it was, the arrangements were to pick up five ounces.

On May 21, 1958, at approximately 2:55 p. m., I arrived in front of 445 South McBride Street in East Los Angeles, with Deputy Victor Segura from the Ventura County Sheriff's office. At that time, as I arrived, I observed defendant Saldana inside the 1958 Ford station wagon, which was driven by defendant Albert Palomino.

I parked—I passed the station wagon, which was parked right in front of the residence of Saldana, and I parked my car two doors, two houses down, because when Saldana saw me arrive, Saldana left the 1958 Ford station wagon and walked towards the Government vehicle I was driving. By that time, I also got out of the Government vehicle and met Saldana in the middle of the—I believe it was in the middle of the block, on the sidewalk.

Q. Did you have some conversation with him at that time?

A. Yes. At that time he inquired who was with me, and I told him it was my uncle and that he was bankrolling me; in other words, he had the money, that he was going [fol. 73] to finance the deal.

Q. That's what you said to him, just what you said?

A. Yes. I told him, "That's my uncle; he's the money man. Don't worry about him."

He said, "Well, that's O. K., but I don't want to meet him."

I said, "You don't have to meet him."

At that time he said, "Well, how much do you want?"

I then told him I wanted five pieces for the man in San Francisco, and my uncle wanted another five pieces.

So he said, "That's fine."

So then he left me and walked back to the 1958 station wagon wherein he had a conversation, which was about approximately a minute, with Albert Palomino, at which time Albert Palomino left the area, and Saldana started walking back on the sidewalk where I was waiting for him, and he told me, "Well, let's go out in the house and sit on the porch."

I said, "Why the porch?" I said, "Let's sit down in the car."

He said, "No. If the man doesn't see me on the porch, that means there's something wrong."

So we went up—I went up to the porch.

Then he said, "Well, let's go buy some beer."

I said, "O. K."

So then Saldana got in the car—we walked to the car, [fol. 74] and Saldana got in——

Q. To whose car?

A. I beg your pardon?

Q. To whose car?

A. The car I was driving, the Government vehicle—and then we went around—I can't remember the name, the name of the street that's next to McBride, but there's a store in the middle of the block, a grocery store. Well, we went, and Saldana bought six cans of beer.

After Saldana bought the six cans of beer, we then went around towards 3rd Street and entered McBride and parked in front of 445 South McBride Street.

Saldana got out of the car and was squatting on the sidewalk. I then left the Government vehicle——

The Court: What do you mean, "squawking"?

The Witness: Squatting.

The Court: Oh, squatting.

The Witness: Squatting.

I then got out of the car and sat with defendant Saldana. Deputy Segura was inside the car.

Then we started talking about connections; at which time Saldana told me, he said, "I can get you better stuff across the border. I know the people out there."

Which was overheard by—the conversation was overheard by Deputy Segura.

[fol. 75] The Court: That may be stricken.

You don't know what Deputy Segura heard. Go ahead.

The Witness: At about this time, approximately, I'd say, 3:30, the 1958 Ford station wagon came back to McBride Street and parked behind the Government vehicle, at which time Saldana left the general vicinity of the Government car and walked towards the 1958 Ford station wagon.

As he got into the passenger side of the station wagon, I seen Saldana put his hand inside the station wagon, and

observed Palomino pick up the brown paper bag and hand it to defendant Saldana.

When I observed this, I believe I asked Saldana if that was the stuff, and he said, "Yes," at which time I then ran towards the car and placed Saldana and Palomino under arrest.

Then Saldana threw the paper bag to me and started running.

By Mr. Bevan:

Q. Then what happened?

A. By that time Deputy Segura went towards the driver's side of the Ford station wagon and took Palomino into custody.

Q. Then what happened?

A. I then picked up the brown paper bag, and I——

Q. Let me interrupt just for a moment, Mr. Lieuanan.

What happened to Mr. Saldana whom you just described as running?

[fol. 76] A. Oh, by this time, I believe it was, Deputy Peterson and the State narcotic agent took pursuit of Saldana. While Saldana was—I lost sight of Saldana, and then I picked up the brown paper bag and kept it in my possession.

I looked inside and I saw there were rubber contraceptives.

The Court: What did you do with it?

The Witness: I kept it in my possession until Deputy Peterson and State Narcotic Inspector Velasquez returned with Saldana towards the area. I then handed the brown paper bag to Deputy Peterson, who kept it in his possession until we all met in the office of the Federal Bureau of Narcotics.

By Mr. Bevan:

Q. Would you take Exhibit 4-A, that brown paper bag you have in your hand, and tell us what that is, Mr. Lieuanan?

A. This is the brown paper bag wherein the other, the 10 rubber contraceptives were contained in.

The Court: Is that the brown paper bag which you say you picked up?

The Witness: Yes, sir; that's right, sir.

The Court: Who threw the bag?

The Witness: Defendant Saldana.

The Court: Threw it on the ground, on the street?

The Witness: No, he threw it at me.

The Court: Oh, he threw it at you?

[fol. 77-81] The Witness: Yes, sir, and it fell on my feet.

The Court: That was after you told him he was under arrest?

The Witness: That's right, sir.

. . . . . .

[fol. 82] Cross-examination.

By Mr. Reinhardt:

Q. Mr. Lienanan, you testified on direct that you were [fol. 83] accompanied, in your first meeting with Mr. Saldana, by a confidential agent. Will you tell me the name of that agent?

Mr. Bevan: Objected to, your Honor. This is a—well, as the witness has testified—a confidential informant, and I see no materiality for the reason to disclose the identity of this man and subject him to the possibility of injury or harm.

This man did not participate in this transaction other than introducing the agent.

Mr. Reinhardt: Your Honor, would you prefer this to be heard at the bench or should I make my statement on this point from here?

The Court: Well, you are going to have to have some time to look at the statements, so you can argue that point out in the absence of the jury.

You are excused until 10:00 o'clock tomorrow morning, and you will remember the admonition. You must not discuss this case among yourselves or with any other person, or form or express an opinion or conclusion on it until it has finally been submitted to you for your decision. You are excused then until tomorrow.

(Whereupon, the jurors left the courtroom, and the following proceedings were had in the absence of the jury:)

Mr. Bevan: Mr. Lienanan, you are excused.

The Court: You don't need to stay there.

[fol. 84] (Witness temporarily excused.)

The Court: The basis of your objection is that it is immaterial?

Colloquy Between Court and Counsel.

Mr. Bevan: And also, your Honor, privileged. The man has been identified as a confidential informant, and the Government relies upon the privilege which the courts have attached to such persons. The courts have invariably held, where a person is a mere informant or tipster, one need not reveal his identity.

Where he participates in the transaction, or the Government relies upon information given by the informant as its probable cause for arrest and search, then, in that case, the identity must be disclosed. But I do not think that the confidential informant's participation in this transaction is sufficient to outweigh the disadvantage of revealing to the world at large his name and thus, probably, his location.

I think, in the recent Supreme Court case of Roviaro v. United States, decided, I believe, last December—I'm sorry, I don't have the citation immediately at my fingertips, but I could get it for your Honor—that the Court said that there must be weighed these various interests, as to the interest of the defendant in preparing his trial versus the public policy in protecting informants. And in that case, why, I believe it was one where the confidential informant was actually the purchaser of narcotics and did so in an auto-[fol. 85] mobile in which a narcotic agent was hidden. And when the narcotic agent testified at the time of trial, why, the Supreme Court held that it was error for the trial court in that instance to refuse to disclose the identity of the informant since he vitally participated in the transaction, and the informant was not produced at the time of trial.

But here, where the only contact of the confidential informant was to make a mere introduction, I don't think that, weighed against the public policy of protecting informants, which is a statutory duty to informants—as the Circuit Court for the Ninth Circuit has stated—I don't think that public policy feature has been outweighed by the necessity of the defendant's having this witness disclosed—having the name of this informant disclosed.

Mr. Reinhardt: Your Honor, as I view the Roviaro case, it is very factually similar to the present case, in that——

The Court: What is the citation of it?

Mr. Reinhardt: I'm sorry, your Honor, I don't have it. I can supply you with it later this afternoon.

The Court: How do you spell it?

Mr. Reinhardt: R-o-v-i a r-o. U. S. v. Roviaro.

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[fol. 86] Mr. Bevan: Your Honor, it is with some embarrassment that I approach you again.

Previously the Narcotics Bureau told me that it did not want to identity of this informant disclosed, and now it has been stated to me that there was no objection on behalf of that Bureau, and consequently there will be no objection on [fol. 87-89] behalf of the United States Attorney.

The Court: Then there is no objection on the part of Exhibit E?

Mr. Bevan: That is correct, your Honor, and I have no objection—I withdraw my objection that was made to the question put to the witness by defense counsel.

Mr. Reinhardt: Your Honor, then, in the absence of the jury, I wonder whether we can be furnished with the address or the present whereabouts of that defense witness so that we may subpoena him—that is, of the confidential informant, so that we may subpoena him to testify for the defense if desirable.

The Court: I don't know whether they know the address.

Mr. Reinhardt: If they know.

Mr. Bevan: I have been informed by the representative of the Narcotics Bureau that they will have that man, Mr. Singh, here tomorrow morning, your Honor, so that he would be available for testimony on cross examination.

The Court: Very well.

Mr. Reinhardt: Thank you.

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[fol. 90] Los Angeles, California, Wednesday, August 6, 1958, 10:00 A.M.

The Court: United States v. Saldana.

Let the record show the defendant is present in person

and by counsel, and the jury is present and each one in his or her place.

Proceed.

Mr. Bevan: I would like to say, your Honor, in connection with the matter advanced last evening, we did have objections to the production of the name of the special employee, as we discussed last night. The government has withdrawn those objections, and he is here in the courtroom for the use of the defense if that is necessary or desirable.

The Court: Mr. Licuanan will resume the stand.

JAYME R. LICUANAN, called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-examination (continued)

The Court: I think the question that is pending is: What was the name of the special employee?

The Witness: Roy Singh, S-i-n-g-h.

The Court: Is he present in court?

The Witness: Yes, sir.

[fol. 91] The Court: Will you stand up, Mr. Singh.

(A man stands up in the courtroom.)

The Court: You may be seated.

Mr. Reinhardt: Your Honor, may I request at this time that Mr. Singh be excluded from the courtroom during the remainder of this witness' testimony?

The Court: Yes. The witness will be excluded from the courtroom. Be available, however.

* * * * * * *

By Mr. Reinhardt:

Q. Mr. Licuanan, I believe you testified on direct examination that you had been an employee of the Narcotics Bureau for the past two years.

A. Approximately two years.

Q. What was your occupation before that?

Mr. Bevan: Objected to as irrelevant, your Honor.

The Court: Objection sustained.

By Mr. Reinhardt:

Q. Will you tell us the circumstances of your first con-
[fol. 92] tact with Mr. Saldana?

A. On April 28th, approximately 4:30 p.m., I met defendant Saldana at 445 South McBride Street.

Q. And you were accompanied by Mr. Singh at that time?

A. That's right, sir.

Q. Did you take any written documents with you to Mr. Saldana?

A. I had.

Q. Can you tell us what was the nature of those documents?

A. It was a letter of introduction.

Q. From whom was this letter of introduction to Mr. Saldana?

A. Julio Contreras.

Q. Were you with Mr. Saldana the first time contact was made with him on the afternoon that you visited him?

The Court: I don't understand the question.

By Mr. Reinhardt:

Q. I understand that you and Mr. Singh went together to see Mr. Saldana.

A. That's right, sir.

Q. Did Mr. Singh go in alone, or did you accompany him?

A. First Mr. Singh went in by himself, to determine whether it was——

Q. That answers the question. Mr. Singh went in alone. Then Mr. Singh returned with Mr. Saldana?

[fol. 93] A. That's right, sir.

Q. Did you, at the time that Mr. Saldana and Mr. Singh returned—isn't it true that you then told Mr. Saldana that his cousin Julio Contreras was then in jail and that Julio Contreras had asked you to come to Mr. Saldana for the purpose of raising some money to bail Mr. Contreras out of jail?

A. Yes, sir.

Q. And your explanation of why you wanted Mr. Saldana to obtain drugs for you was in order to aid his cousin who was in jail and needed the money for his legal defense?

A. I don't believe I put it that way. I believe I—as I

recall it, I made it clear to Mr. Saldana that I was a dope peddler, that I was dealing in dope, and I was looking for a source of supply and that, if I was able to purchase some heroin, that I would then take some of the profits, my profits from the sale of this drug, and would then help Julio Contreras. I was not obligated to Julio Contreras. That is the way I placed it before Mr. Saldana.

Q. You informed Mr. Saldana that Julio Contreras was in jail and that he was unable to get out of jail because of lack of sufficient funds, and that, if Mr. Saldana went through with this transaction, he would be able to assist Mr. Contreras?

A. I don't believe I quite understand what you mean.

Q. Well, I'll break up the question into parts.

[fol. 94] It is not true that you informed Mr. Saldana that his cousin Julio Contreras was in jail?

A. Yes.

Q. And you further informed Mr. Saldana that his cousin Julio Contreras did not have the funds which would be necessary to enable him to get out of jail on bail?

A. That's right.

Q. And you informed Mr. Saldana that if he were able to procure drugs for you that that would be a possible way of getting Mr. Contreras out of jail?

A. I don't believe it was—I don't believe it was that way. I didn't put it to him that way.

Would you like me to relate to you exactly what the conversation was at that time? And then maybe it would explain to you—would answer your question.

Mr. Reinhardt: Well, I think we have enough of the conversation at this time.

The Court: Well, he had just as well do it. If you don't, the Government will take up time and ask him afterward.

Mr. Reinhardt: Well, we may come back to that, your Honor.

The Court: All right.

By Mr. Reinhardt:

Q. Isn't it also true, upon your initial request to Mr. Saldana, he informed you that he was not engaged in the [fol. 95] traffic of narcotics?

A. That is not true.

Q. Did Mr. Saldana tell you he was engaged in the traffic?

A. Yes. Mr. Saldana at that time stated to me that he "Why go to the man when I know the source of the man's supply?" He then told me, "Why, only yesterday I sold 20 ounces to a kitty." He said, "Then I got another deal for another 20 ounces for $2,500. Deal with me." That's what he said.

At that time I was going to go out to him for him to introduce me to another man. He refused to introduce me, but instead told me, "Why go to him when I can do it for you?"

Q. Isn't it true that when you went to Mr. Saldana, you had no information that he was engaged in the traffic of narcotics?

A. Yes, sir; I have known that he was—he had been convicted several times and had been involved in narcotics——

Mr. Reinhardt: Your Honor, may I ask that that remark be stricken from the record?

Mr. Bevan: That was specifically asked for, your Honor.

Mr. Reinhardt: No. I'm sorry, your Honor——

The Court: Yes, it was.

Read the question again.

(The last question was read, as follows:

[fol. 96] ("Q. Isn't it true that when you went to Mr. Saldana, you had no information that he was engaged in the traffic of narcotics?")

The Court: He can proceed, but the answer will remain. You asked for it, and he can explain his answer.

Mr. Bevan: I believe he was interrupted—

The Court: And he was.

Mr. Bevan: —and I think he can proceed to finish his answer as to the information he had at the time.

Mr. Reinhardt: May I have an objection to that, your Honor?

The Court: Yes.

You can go ahead and finish.

The Witness: Prior to the time that I met Leonard Saldana, I checked with the Sheriff's office for his record, and at that time I found out that he was involved in narcotics.

The Court: Had he been convicted?

The Witness: I don't recall offhand, but I believe he had been involved or convicted of narcotics, for possession of heroin in Los Angeles.

The Court: That was your information?

The Witness: That's right, sir, to the best of my recollection.

By Mr. Reinhardt:

Q. You don't know now that he had been convicted of possession of heroin, do you?

[fol. 97] A. I've arrested so many people since I've arrested Mr. Saldana that I can't recall all those facts.

Q. But you recalled it well enough to state just now that that was your information?

A. I believe—to the best of my knowledge right now, I believe that his record showed that he had some—he was involved in some narcotic violations.

The Court: But you don't know whether or not he was actually convicted?

The Witness: No, I don't recall whether he was convicted, but I recall that there was some indication in his rap sheet for suspicion of state narcotic——

By Mr. Reinhardt:

Q. Do you have any idea when, if there was such a mark on his record of being arrested for suspicion—when that would have been?

A. Not right now. I can refresh my memory with the records.

Q. No. I'm asking you, do you have any idea right now?

A. No, sir. As I said, I've arrested so many people since then that I don't recall.

Q. What other information did you have at that time when you went to him that Mr. Saldana was then engaged in the traffic of narcotics?

A. No other information.

Q. No other information?

[fol. 98] A. No, sir.

Q. You say you went to Mr. Saldana not in order to obtain any narcotics from him?

A. That's right, sir; not from him.

Q. Can you tell me how Mr. Singh was dressed when he accompanied you?

A. Khaki pants, T-shirt, and a blue tanker jacket, nylon, I believe it was.

Q. I'm sorry. Blue what?

A. A blue jacket.

Q. Mr. Saldana did not have any drugs in his possession when you approached him; is that correct, as far as you know?

A. No, sir. I didn't see— I didn't search him at that time.

Q. No. As far as you know, he didn't have any?

A. No.

Q. And Mr. Saldana told you he didn't have any drugs?

A. No, I don't believe he did. He didn't tell me anythink about whether he had it in his possession or not. I don't——

Q. He didn't tell you to come back at 8:00 o'clock because he had to make a telephone call in order to get the drugs?

A. Yes.

Q. In other words, he did tell you that he didn't have [fol. 99] any drugs in his possession?

A. No. He just told me to come back at that time and he'd have it ready.

Q. He didn't tell you he had to make a telephone call to get the drugs?

A. Yes, he did. He told me he was going to make a telephone call.

Q. In order to get the drugs?

A. To get the drugs delivered to him.

Q. At no time when you—in any of these transactions, as far as you know, did Mr. Saldana have any drugs in his possession or on his premises, as far as you're aware? Is that correct?

A. I didn't see any in his possession.

Q. And as far as you know, in every instance——

The Court: Do you mean, except when he——

The Witness: When he delivered the——

The Court: Yes.

The Witness: When he delivered the exhibits to me.

By Mr. Reinhardt:

Q. And insofar as you're aware, in every instance Mr. Saldana made contact after talking to you, made contact with the source of the drugs and arranged to get them for you?

A. Well, I think he usually makes a phone call, yes. He makes a phone call before the drugs are delivered.

[fol. 100] Q. And all of these transactions resulted from your initial conversation with Mr. Saldana after he talked to the informant, Mr. Singh?

Mr. Bevan: Objected to, as calling for a conclusion of the witness as to how these sales came about and from what source.

The Court: Sustained.

By Mr. Reinhardt:

Q. In point of time, all of these transactions took place after your initial discussion with Mr. Saldana, in which you told him that his cousin was in jail and needed money to get out on bail?

A. I believe—well, I don't know whether that's the reason he had for selling me the stuff.

Q. I just asked you whether these conversations took place after that time.

A. Yes.

Q. Now, Mr. Saldana told you that the price of the drugs would be $200 an ounce; is that correct?

A. Yes, sir.

Q. Did not Mr. Saldana also tell you at that time that he would get these drugs for you but that he would make no profit from the sale?

A. Well, I don't know whether that was true or not.

Q. You don't remember that?

The Court: Did he tell you that?

[fol. 101] The Witness: I don't recall, sir.

The Court: Did he tell you that he would make no profit from the sale?

The Witness: I don't recall.

The Court: Was it ever mentioned?

The Witness: I don't recall. To the best of my knowledge, I don't think—well, yes. It was on the second purchase, the purchase of the Exhibit 2-A.

The Court: What did he say then?

The Witness: I believe he said, "Well, I'm not making any bread on this thing. If I'm making any, it would be very small."

By Mr. Reinhardt:

Q. Isn't it true that Mr. Saldana told you, on the occasion of the first meeting, that he was going to arrange for you to get these drugs for his cousin, in order to assist his cousin, and that he would not make any money out of this deal at any time?

Mr. Bevan: That is objected to, as a combination of a series of questions, your Honor. I think it could more accurately be answered by having the question split up.

The Court: Let me hear the question.

(The pending question was read.)

The Court: I think the question is clear. Objection overruled.

The Witness: I believe he mentioned that, that he was [fol. 102] not making any money out of it, out of this transaction.

By Mr. Reinhardt:

Q. You mentioned that there was a 1958 station wagon: is that correct?

A. Yes, sir.

Q. Used in this deal?

A. Yes.

Q. Do you know who owned that station wagon?

A. Albert Arroyo Palomino.

Q. Have you ever seen Mr. Saldana's car?

A. I don't believe I have ever seen him driving a car.

Q. You have never seen him driving a car?

A. No, sir.

Q. But you were with him in vehicles many times or several times throughout these dealings, yet it was never in his car, is that right?

A. That's right, sir.

Q. Are you aware of how much money Mr. Saldana had in his possession when he was arrested?

A. No, sir. I didn't have any part in searching him, except that—after I placed him under arrest, he ran; he was apprehended——

Q. No. I just asked whether you knew.

A. I didn't search the defendant.

Q. You didn't search the defendant?

A. No, sir.

[fol. 103-104] Q. Do you know the name of the officer who arrested or who searched Mr. Saldana?

A. I don't know because, as soon as the arrest, went down—Mr. Segura and myself left the area and left all the details for the other officers.

Q. All right. From your knowledge of this case, are you aware that Mr. Saldana is impecunious?

A. What's that word, sir?

Q. Are you aware of Mr. Saldana's insolvent financial position?

A. He never told me that.

Q. Have you engaged in similar transactions, accompanied by the informant, Mr. Singh, previously?

Mr. Bevan: Objected to as irrelevant and immaterial.

The Court: Objection sustained. It is wholly irrelevant and immaterial.

. . . . . .

[fol. 105] Mr. Bevan: Would you like to examine this Exhibit No. 5 for identification, counsel?

Mr. Reinhardt: Yes, thank you.

(Defendant and counsel examining document.)

Mr. Reinhardt: Your Honor, may we approach the bench before this exhibit is shown?

The Court: Yes.

(The following proceedings were had at the bench:)

Mr. Reinhardt: Your Honor, I would like to make the same objection——

The Court: Let's see it.

Mr. Reinhardt: —to the use of this document that I made to the question asked concerning his previous convictions, in that the question I asked, which your Honor ruled opened this up, was, had he any information that he was actively engaged—I believe; was it actively or just engaged—in drug transactions?

Mr. Bevan: I don't recall.

The Court: Your question is pretty broad.

Mr. Reinhardt: This is 10 years earlier, your Honor, 10 years earlier; and this is the only basis that he had for saying he was engaged in the traffic of drugs, I consider [fol. 106] that objectionable.

The Defendant: It wasn't heroin either.

Mr. Bevan: The only purpose that I was planning to use this for, your Honor, was to ——

The Court: Refresh his recollection?

Mr. Bevan: —refresh his recollection, if he desired to do so, from records.

The Court: I think so. Objection overruled.

(Whereupon, proceedings were resumed in open court as follows:)

Redirect examination.

By Mr. Bevan:

Q. Mr. Lieuanan, you were asked by defense counsel on cross examination as to whether you knew, at the time you first went to Mr. Saldana, whether he had previously been convicted of some narcotic charge.

Mr. Reinhardt: I object, your Honor. I did not ask the witness that.

The Court: No, he did not ask him that.

The question was with relation to what information—whether or not he had any information concerning the defendant Saldana.

Mr. Bevan: Then I thought, your Honor——

Mr. Reinhardt: No, your Honor; that also was not the [fol. 107] question.

The Court: All right. Let's find the question. Do you think you can find it?

Mr. Bevan: Your Honor, may I add some comment?

The Court: Read the question, if you can find it.

(The question referred to was read, as follows:

("Q. Isn't it true that when you went to Mr. Saldana, you had no information that he was engaged in the traffic of narcotics?")

Mr. Bevan: Your Honor, what I had in mind was immediately following the reading of that question.

The Court: All right.

(The record was further read, as follows:

("A. Yes, sir: I have known that he was—he had been convicted several times and had been involved in narcotics———

("Mr. Reinhardt: Your Honor, may I ask that that remark be stricken from the record?

("Mr. Bevan: That was specifically asked for, your Honor.

("Mr. Reinhardt: No. I'm sorry, your Honor—

("The Court: Yes, it was.

("Read the question again.

((The last question was read . . .)

("The Court: He can proceed, but the answer will [fol. 108] remain. You asked for it, and he can explain his answer.

("Mr. Bevan: I believe he was interrupted—

("The Court: And he was.

("Mr. Bevan: —and I think he can proceed to finish his answer as to the information he had at the time.

("Mr. Reinhardt: May I have an objection to that, your Honor?

("The Court: Yes.

("You can go ahead and finish.

("The Witness: Prior to the time that I met Leonard Saldana, I checked with the Sheriff's office for his record and at that time I found out that he was involved in narcotics.

("The Court: Had he been convicted?

("The Witness: I don't recall offhand, but I believe he had been involved or convicted of narcotics, for possession of heroin in Los Angeles.

("The Court: That was your information?

("The Witness: That's right, sir, to the best of my recollection.

(By Mr. Reinhardt:

("Q. You don't know now that he had been convicted of possession of heroin, do you?

("A. I've arrested so many people since I've ar-

[fol. 109] rested Mr. Saldana that I can't recall all those facts.

("Q. But you recalled it well enough to state just now that that was your information?

("A. I believe—to the best of my knowledge right now, I believe that his record showed that he had some—he was involved in some narcotic violations.

("The Court: But you don't know whether or not he was actually convicted?

("The Witness: No, I don't recall whether he was convicted, but I recall that there was some indication in his rap sheet for suspicion of state narcotic——

(By Mr. Reinhardt:

("Q. Do you have any idea when, if there was such a mark on his record of being arrested for suspicion—when that would have been?

("A. Not right now. I can refresh my memory with the records.")

Mr. Bevan: That's all, your Honor. That is the specific portion I referred to.

By Mr. Bevan:

Q. Could you refresh your memory as to that event, Mr. Lienanan, by taking a look at Exhibit No. 5 for identification? Do not say anything; just look at it for a moment.

A. Yes, sir. (Witness complies.)

Q. Is your memory now refreshed as to whether or not, [fol. 110] before you went to Mr. Saldana, you knew that he had been convicted of a charge of——

The Court: Whether he had information.

By Mr. Bevan:

Q. —whether you had information to the effect that Mr. Saldana had been convicted of a state narcotic offense?

A. Yes, sir.

The Court: All right. Had he?

The Witness: Yes, sir.

By Mr. Bovan.

Q. Now, please relate for us the exact conversation, as you can now recall it, that occurred at the time that you were introduced to Mr. Saldana by Mr. Singh. Please tell us what occurred then.

A. As I remember it now, we arrived in there approximately 4:30 p.m. We parked in front of the house of defendant Saldana.

The special employee left the Government vehicle, went to the front of the house, knocked. There was no response, and he then went to the rear.

He was gone from my view for approximately a minute, at which time I then observed the special employee and defendant Saldana walking from the rear on the side of the house, and sit on the front steps of the house where they conversed, I believe it was, two or three minutes.

Q. What was the conversation you had with the defendant [fol. 111] Saldana?

A. Then, when Saldana and the special employee approached the Government vehicle, I was introduced to Saldana as, "This is Sal. This is Leonard." And I said, "How are you?"

And Saldana then told me, "I understand you want to pick up some stuff." And I said, "Yes."

And then, after that, the conversation shifted to defendant Saldana asking me about Julio. Well, I then referred to him: "Yes, I heard he's in jail, and I would like to help him if I can." "But," I said, "I'm dealing in stuff, and whatever profit I make out of my transactions, then I would then help in raising the money or contributing to the premium of the bond."

I then inquired from him about Pancho.

He then told me, he said, "No, man. I know where Pancho's getting his stuff."

Q. Who is Pancho?

The Court: Was that the only name he used?

The Witness: Yes.

The Court: Pancho?

The Witness: Yes, it was only Pancho.

The Court: Go ahead and tell the conversation.

The Witness: I then inquired from him——

The Court: What did he say?

[fol. 112] The Witness: He said, "No, man, don't deal with Pancho. His stuff is no good." He said, "I know the man that Pancho gets it from."

I said, "O. K."

And then he then asked me how much I wanted. He said, "Come on. You want a half, one, two, three? Tell me." He said, "I can give you all you need, but I got to make the phone call right now so we can get this thing delivered."

I then told him, I said, "Well, I guess I've got enough bread"—"bread" referring to money—"for two."

He said, "O. K." He said, "Wait a second."

So then he went inside and—where he disappeared for approximately a minute, and then I next observed him by the door holding a telephone and apparently talking in the telephone; I was too far away to hear the conversation. After which——

Mr. Reinhardt: Your Honor, doesn't this answer go beyond the scope of the question? I think the question was asked about the conversation. It seems to me the conversation——

The Witness: Well, that's part of the conversation.

The Court: No, I don't think so.

Go ahead.

The Witness: Then he returned and told me, "Well," he said, "come back at about 8:00 o'clock."

The Court: When did he say this that you testified to a [fol. 113] while ago, "why do you deal with somebody else? Deal with me. Yesterday I sold 20 ounces"?

The Witness: Yes, sir; I'm coming to that, your Honor.

The Court: Oh.

The Witness: Then, when he came back, he said, "Well, man, this kitty's really good," and he said, "Why, only yesterday" or "the day before yesterday," he said, "I got rid of 20 ounces to one of my best customers." And he said, "I've got another customer now that wants another 20 ounces. And, man, this kitty can really supply you all you need."

By Mr. Bevan:

Q. What does the term "kitty" mean in the narcotic trade, Mr. Lieuanan?

A. The source of supply.

Q. The source of supply of what?

A. Heroin.

Mr. Bevan: That is all the questions I have, your Honor.

The Court: Further cross?

Mr. Reinhardt: Yes, your Honor.

Recross-examination.

By Mr. Reinhardt:

Q. Mr. Lieuanan, your memory has been refreshed by the document you have seen, that is, as to certain information concerning the defendant's prior narcotic record; it that correct?

[fol. 114] A. Yes, sir.

Q. Have you learned the year of his prior narcotic conviction?

A. Yes, sir.

Q. What is that year?

A. 1947.

Q. And is that the information that led you to believe that he was engaged in the traffic of narcotics in 1958?

A. No. I have had other reliable information, which was approximately—prior to the meeting with Saldana, I'd heard from the deputy sheriffs working narcotics in East Los Angeles that there was a dealer there by the name of Leonard, and was living in the general vicinity of McBride, that was actively engaged in the transaction of heroin.

Q. Can you tell us the names of the deputy sheriffs who gave you that information?

A. I don't recall offhand now. This was during coffee time in East Los Angeles, where general conversations turn to who are the dealers.

Q. You have never put that information into any Government report, have you?

A. No, sir.

Q. This is the first time that you have ever told anyone that you had that infomation, and that you got it at a coffee discussion with some unknown sheriff?

[fol. 115] A. Oh, no sir. No, sir. My partners—I always discuss these things with my partner, telling him that there is now a good dealer in East Los Angeles by the name of Leonard.

Q. You've made about five reports to the Government concerning Mr. Saldana, haven't you?

A. I made those reports in regards to the purchases.

Q. Yes. And nowhere in those reports did you ever mention that you had had information that it was generally known that Mr. Saldana was dealing in narcotics?

A. That's not—no, sir. The reports—the 184 reports of the purchases, the events and the transactions——

Q. Yes, but——

A. —are not for information; no, sir.

The Court: Is that generally put in the report, your previous information?

The Witness: It all depends on the—it all depends on the agent, your Honor.

By Mr. Reinhardt:

Q. And you have no way of letting us know the names of any people who might have told you, prior to the time you approached Mr. Saldana, that he was actively engaged in narcotics?

A. I believe it was—to the best of my recollection, I think it was Deputy Peterson——

Q. Deputy Peterson?

[fol. 116] A. —that told me about a man out in East Los Angeles whose name was Leonard.

Q. Deputy Peterson of the Los Angeles Sheriff's office?

A. That's right, sir. He's currently teamed up with our team, assigned to our team.

LOUIS PETERSON, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

* * * * * * * *

Direct examination.

By Mr. Bevan:

Q. What is your business or occupation, Mr. Peterson? [fol. 117] A. I'm a deputy sheriff employed by the County of Los Angeles, presently assigned to the Sheriff's narcotic detail; our headquarters, it's in the Hall of Justice, Los Angeles.

Q. I see. Do you ever work the East Los Angeles area, sir, in the performance of your duties?

A. Yes, sir, I have.

Q. For how long have you been with the Sheriff's office?

A. Approximately five and a half years.

Q. Did you ever have a conversation with Mr. Licuanan, the witness who just left the stand, concerning Leonard Saldana?

A. Yes, sir, I have.

Q. Did you have occasion to perform some duties with respect to this case, Mr. Peterson?

A. Yes, sir.

Q. And did you have occasion to perform those duties on May 7, 1958?

A. Yes, sir I did.

Q. Where were you when you performed those duties?

A. I was parked to the north and to the east of 445 South McBride.

Q. At approximately what time of day or night, sir?

A. Approximately 4:15 p.m., as I recall, on this date, I parked at this location.

Q. Could you keep your voice up just a little bit? [fol. 118] A. Yes, sir.

Q. You were parked in a vehicle?

A. Yes, sir, in an undercover Government vehicle.

Q. Were you with anyone else at this time, if you recall?

A. No, sir; I was by myself at this time.

Q. And what did you see, Mr. Peterson, if anything?

A. I saw Agent Licuanan drive to the location in a Gov-

ernment vehicle, park his vehicle, and go to 445 South McBride and engage the defendant Saldana in a short conversation.

Q. Where did that apparent conversation occur, between those two gentlemen?

A. On the front porch of this location.

Q. Then what happened next, Mr. Peterson?

A. Agent Licuanan left the area, and I remained in the undercover vehicle at this location.

Q. What did you next see happen, if anything?

A. At approximately 6:55 p.m., Agent Licuanan returned to the location and went to the front porch, and I believe he was admitted inside the house.

At about 7:00 p.m., I observed a 1958 gray and white Ford station wagon, driven by defendant Palomino, park in front of this location.

The defendant Saldana then came out and had a short [fol. 119] conversation with Palomino, and returned to the house.

Palomino left the location, going south on McBride; he turned west on Eagle, and I lost him from view.

About a minute later, Agent Licuanan left 445 South McBride, entered his vehicle, and left the area.

About a minute later, defendant Saldana left 445 South McBride, ran south on McBride to Eagle, and I lost him from view.

I then left the area.

Q. Was that about the extent of your investigative activities on that day, May 7th?

A. Yes, sir, it was.

Q. Did you have occasion to perform any similar activities on May 13, 1958?

A. Yes, sir.

Q. And where—you at the time you first commenced such activities?

A. At the same location, parked in approximately the same spot.

Q. At approximately what time of day or night, sir?

A. I believe it was around 5:30 p.m.

Q. And what did you see or hear, Mr. Peterson?

A. I observed Agent Licuanan drive to this location in a Government vehicle. He went to the front porch and was greeted by defendant Saldana.

[fol. 120] Saldana then—they had a short conversation. Saldana then went back inside 445 South McBride, came back out a short time later, and they left in Agent Licuanan's vehicle.

That's all that I observed on this date.

Q. Did you have occasion to perform any investigative duties with respect to this case on May 21, 1958?

A. Yes, sir, I did.

Q. At what time of day or night?

A. I believe it was approximately 2:15 p.m. on this date.

Q. And where were you, Mr. Peterson?

A. I was parked in approximately the same location, to the east and north of 445 South McBride.

Q. What did you observe take place, sir?

A. When I arrived at this location in the undercover vehicle, I observed defendant Palomino and defendant Saldana seated in the 1958 Ford station wagon in front of 445 South McBride.

About two or three minutes later, Agent Licuanan and Deputy Segura arrived in a Government vehicle and parked to the south of the Ford station wagon.

Saldana then left the station wagon and met with Agent Licuanan who had also alighted from his vehicle. They conversed for a short time, and Saldana returned to the station wagon.

[fol. 121] Agent Licuanan walked by the station wagon and up to the front porch of 445 South McBride.

Agent Licuanan then came back down and said something to Saldana in the station wagon.

Defendant Palomino then left the area alone, and Saldana and Agent Licuanan and Deputy Segura left shortly thereafter. They returned about five minutes later and remained seated in the vehicle. I believe Saldana did get out one time.

About five or ten minutes after this, I observed the defendant Palomino drive south on McBride from 3rd Street and stopped his vehicle in front of the location, 445 South McBride.

Defendant Saldana and Agent Licuanan then approached the—or Saldana approached the station wagon first, with Licuanan following shortly thereafter.

I observed the defendant Saldana have a brown paper bag in his hand, and, after Agent Licuanan pulled his gun,

he threw this bag at Agent Licuanan and ran to the rear of 442 South McBride.

At this time State Narcotic Inspector Velasquez and myself gave chase and apprehended defendant Saldana at the rear of this location and returned him to the station wagon.

Q. By the way, on or before April 28th of this year, had you ever furnished information about Mr. Saldana to Agent Licuanan?

[fol. 122] A. Yes, sir, I had.

Mr. Bevan: No further questions.

The Court: Cross-examine.

Cross-examination.

By Mr. Reinhardt:

Q. While Mr. Licuanan was testifying from the stand and you were sitting back here, did you make any signal to Mr. Licuanan?

A. No, sir.

Q. Did you hear Mr. Licuanan's testimony?

A. I've heard part of it this morning? I left the building for a half an hour or so.

Q. Were you in the courtroom when Mr. Licuanan first stated that he was unable to remember the name of the deputy sheriff who had furnished such information to him?

A. Yes, sir, I was.

Q. And you were sitting in that row when Mr. Licuanan remembered that you were the one who had furnished that information?

A. Yes, sir, I was.

Q. And you heard all of his testimony in that regard?

A. Yes, sir, in that regard.

Mr. Reinhardt: No further questions.

Mr. Bevan: I have none, your Honor.

[fol. 123] STUART NADLER, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

. . . . . .

Direct examination.

By Mr. Bevan:

Q. What is your business, Mr. Nadler?

A. I'm a Treasury agent atached to the Bureau of Narcotics.

Q. Your office is here in this building?

A. Yes, sir; Room 1755.

Q. Did you have occasion to perform any duties with respect to this case on April 28, 1958?

A. Yes, sir, I did.

Q. And where were you at the time you first performed such duties?

A. In the vicinity of 3rd and McBride Streets.

Q. At what time of day or night, sir?

A. At approximately 6:55 to 7:00 p.m.

[fol. 124-125] Q. What did you see at that place, if anything?

A. I saw Agent Licuanan and Special Employee Singh approach 445 McBride in a vehicle, Government vehicle; and I subsequently saw Special Employee Singh emerge from the vehicle, and, after a little bit, Agent Licuanan emerged from the vehicle.

. . . . . .

[fol. 126] Q. Did you have occasion to perform some duties with respect to this case on May 7th, Mr. Nadler?

A. Yes, sir.

Q. At what time of day, sir?

A. About 7:00 p.m. Well, it was earlier in the day, actually. About 5:00, Agent Licuanan went to 445 South McBride and, after about 10-minute interval, he emerged from there and we met him at another location, and he told us nothing would be happening——

Q. Well, you had a conversation with him then; is that right?

A. Yes, sir.

Q. And did you later see him in the vicinity of 445 South McBride Street that day?

A. Yes, sir, at about 7:00 p.m.

Q. And what did you observe at that time?

A. We observed his vehicle parked. I didn't actually see him enter the building. And, subsequently we observed a 1958 Ford station wagon, driven by Albert Arroyo Palomino, enter the block and park in the vicinity of 445 South McBride.

The station wagon subsequently left, and, right after that, [fol. 127] Agent Licuanan left—we saw the vehicle drive off. We were too far away to actually see anything.

Q. Directing your attention to May 21, of this year, did you have occasion to perform some investigative duty on that day?

A. Yes, sir.

Q. And where were you at that time that you first commenced such duty?

A. I was in a Government automobile with another agent. We were parked in the vicinity of 445 South McBride.

Q. When, sir? What time of day?

A. At about 2:30 in the afternoon.

Q. What did you observe or hear at that place?

A. We were informed that the 1958 Ford station wagon, which I mentioned previously, had left the area; we were informed by radio. We attempted to locate it, and we subsequently learned that it was in the vicinity of an address on Ganahl Street. We proceeded to that area and saw the vehicle leaving the Ganahl Street address, and picked it up in the vicinity of City Terrace, and we followed it back to the vicinity of 445 South McBride.

Mr. Bevan: No further questions.

The Court: Cross-examine.

Mr. Reinhardt: Yes.

[fol. 128] Cross-examination.

By Mr. Reinhardt:

Q. You were not present, were you, at the initial conversation between Mr. Saldana and Agent Licuanan on May 28—April 28th?

A. Within audible view?

Q. Yes.

A. Or range. No, sir.

Q. You were unable to determine then, and you have no information on the subject of the method whereby Mr. Saldana first agreed to sell the narcotics to——

The Court: "Method" calls for a conclusion.

By Mr. Reinhardt:

Q. You heard nothing——

A. No.

Q. —which would give you any information as to the arrangements made between the defendant and Agent Licuanan?

Mr. Bevan: It's been asked and answered, your Honor.

The Witness: No, sir, I did not.

Mr. Bevan: He stated he was not within audible range.

Mr. Reinhardt: No further questions.

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[fol. 129] VICTOR J. SEGURA, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Bevan:

Q. What is your business or occupation, Mr. Segura?

A. I'm deputy sheriff for the County of Ventura.

Q. How long have you been so employed?

A. Five years, sir.

Q. Did you have occasion to perform some official duties with respect to this case on May 21, of this year?

A. Yes, sir.

Q. Approximately at what time did you commence those duties?

A. It was about 2:45 or 2:55 p.m.

Q. And where were you at this time?

A. I was with Agent Licuanan, and we were in a Government car on South McBride Street at about, oh, two houses south of that address.

Q. Did you have occasion to see the defendant at that [fol. 130] time?

A. I did, sir.

Q. Tell us how you happened to see him.

A. When Agent Licuanan and myself arrived at this address, we observed—or I observed a station wagon parked across, or rather in front of 445 McBride, with two individuals in it. And Agent Licuanan stated to me that——

Q. Well, he told you something?

A. Yes, sir.

Q. Then what happened next?

A. Well, we stopped, and the now defendant got out of the station wagon, and Agent Licuanan left the Government vehicle and went out on the sidewalk and met the now defendant.

The Court: What date was this?

The Witness: That was on May the 21st, of this year.

By Mr. Bevan:

Q. Then what happened after that, Mr. Segura?

A. I observed Agent Licuanan and the defendant having a conversation for just a short while, and then I observed both go toward the entrance of the—walk to the house. Agent Licuanan went to the porch, and the defendant walked to the station wagon. I did not see what he did in the station wagon at the time; there was another car behind us right then.

And then I observed Agent Licuanan come back to the sidewalk and have another short conversation with the [fol. 131] defendant and then they came to the Government vehicle.

Q. Then what happened, Mr. Segura?

A. Agent Licuanan introduced the defendant to me and stated that I was his uncle.

Q. You are not his uncle, are you?

A. No, sir.

Q. Then what happened?

A. A short conversation ensued between the two. I did not take much part in that conversation, but I was only observant in it. This was relevant to the purchase——

Q. Did you hear what was said, Mr. Segura?

A. Yes, sir.

Q. What was said at that time?

A. That Agent Licuanan introduced me and stated that I wanted to pick up some stuff, and that I had the money for that particular transaction. At the time——

Q. Did Mr. Saldana state anything at that time?

A. He was listening at that time.

Q. I see. Proceed.

A. At the time Agent Licuanan stated that I would be interested in five or even seven pieces, or thereabouts, that I could buy at that time.

And then the defendant stated that he would be able to furnish that for me, but he would have to talk to the man first.

[fol. 132] Q. Then what happened after that, Mr. Segura?

A. The defendant stated that we could go around the block and buy some beer. The three of us got into the vehicle; we went around the block to a street, I believe the name is McDonnell, and we did stop at a small grocery store. The defendant purchased, I believe it was, a six-package of beer.

We went back to the location. We parked in front of the address, and just a few minutes went by, and then this station wagon—a man within the station wagon drove just a few feet behind our vehicle, and the defendant stated that, "Just a moment," or that the man was there, and he would be right back.

He left our vehicle and traveled toward the station wagon.

Agent Licuanan got out of the Government vehicle. I stayed in it, but I looked toward the rear through the rear window and observed the man, now known as Palomino, reaching with an object or a brown paper wrapping of some sort, and observed the defendant reaching into the car to receive it.

About that time, Agent Licuanan stated to me, "All right, let's make the arrest," and we both proceeded—he proceeded ahead of me. I opened my side of the car—I was driving—and I went to the driver's side and also assisted in placing Mr. Palomino under arrest.

[fol. 133] Q. I place before you Exhibit 4-A for identification. Can you identify that for us, Mr. Segura?

A. Yes, sir. I have my initial "V" on this one, on the outside.

Q. When was the first time that you saw that exhibit?

A. This was at the time that it was thrown to Agent Licuanan, in the evening, that same evening when I initialed this. Here you are, right here (indicating).

. . . . . .

Cross-examination.

By Mr. Reinhardt:

Q. Mr. Segura, you were not present at the conversation between Agent Licuanan and the defendant when the original arrangement for the purchase of drugs by the Government was made; is that correct?

A. Sir, I do not understand that question clearly. By this—is that the actual purchase at this moment?

Q. No. On April 28th.

[fol. 134] A. No, sir, I was not.

Q. You were not present?

A. No, sir.

. . . . . .

Mr. Bevan: The Government rests.

The Court: Does counsel wish to approach the bench?

Mr. Reinhardt: Yes, your Honor.

(The following proceedings were had at the bench:)

Motion for Judgment of Acquittal and Ruling Thereon

Mr. Reinhardt: I would like to make a motion for the judgment of acquittal on the grounds that the defense of entrapment is apparent in the Government's presentation of its case, and it is established therein.

The Court: Any other grounds? Statutory grounds, insufficiency of the evidence to support the charges?

Mr. Reinhardt: Yes, your Honor, and all other grounds which may occur to your Honor.

The Court: The question of entrapment is a question of fact.

Mr. Reinhardt: Yes.

The Court: It will be decided by the jury, and the motion is denied on that ground.

In connection with your motion for the dismissal on the [fol. 135] ground that the evidence does not support the charges, I do not think there is sufficient evidence to support Count 1, conspiracy.

Mr. Bevan: Well, I would like to say, your Honor, that I think it is apparent from the evidence that the person delivering the narcotics——

The Court: Everything here would have to be deduced by an inference——

Mr. Bevan: That is true.

The Court: —and by people who saw somebody whom they later learned to be so and so, and I don't think it is sufficient to permit Count 1 to go to the jury. So your motion for judgment of acquittal as to Count 1 is granted on the ground of insufficiency of evidence.

The motion is denied as to Counts 2, 3, 4, and 5.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Reinhardt: Yes, your Honor.

May we now have a ——

The Court: Instructions.

Mr. Reinhardt: Oh, instructions?

The Court: Do you want a copy of the instructions? I was reading them here a minute ago. Here they are. Have you seen these?

Mr. Bevan: At one time or another, yes, your Honor, several weeks ago, and I have no objection to them.

The Court: That is, on the sale?

[fol. 136] Mr. Bevan: Yes.

The Court: Yes.

Mr. Reinhardt: These are just on the sale?

The Court: Well, and then the general instructions.

Mr. Reinhardt: Do you have an entrapment instruction?

The Court: What's that?

I have an entrapment instruction. I will give the one that is in Judge Mathes' booklet. Are you familiar with it?

Mr. Reinhardt: No, your Honuor, I'm not.

The Court: It's published in the Federal Rules. Here, I may have a copy that I'll loan you, and you can return.

Mr. Reinhardt: All right. Thank you very much.

Mr. Bevan: I also had thought that Judge Mathes' instructions had an entrapment instruction.

The Court: Yes, they do have an entrapment instruction —56.

Mr. Bevan: The Government will also request that the "aiding and abetting" instruction in the form instructions be granted—given to the jury, your Honor.

The Court: I don't think that is applicable to this defendant.

Mr. Bevan: I guess not. I just was thinking ahead of time of the defense.

The Court: No.

This is 56. You can look at it there.

[fol. 137] Mr. Reinhardt: Thank you.

The Court: This form here; and the general instructions are these, where applicable (indicating).

If you will return those to me, please.

Mr. Reinhardt: Yes, sir.

Mr. Bevan: We intend to offer on one instruction, and that is the definition of the word "facilitate" as used in the indictment, in the statute, unless your Honor has that covered already.

The Court: I don't have that here.

Mr. Bevan: Very well.

The Court: Because these are sales——

Mr. Bevan: Yes, your Honor.

The Court: —and you have either proven sales or nothing, I mean.

Mr. Bevan: That is true.

The Court: So I don't think that "facilitate" is in order in this case.

Mr. Reinhardt: Your Honor, do you have an instruction on the failure of the Government to call a witness who is a former employee or agent, to be used as a presumption?

The Court: No, no. I have instructed as to the witness that is available to either side——

Mr. Reinhardt: Yes.

The Court: —and they do not call him.

[fol. 138] Mr. Reinhardt: Is there an obligation, in your Honor's opinion, on the defense to call a former Government agent as a defense witness?

The Court: I don't think there is any obligation. I

mean, that is up to you. The Government has decided not to call him. They decided, apparently, that they don't need him.

Mr. Reinhardt: Yes. And you would not give an instruction as to there being a presumption that his testimony would be——

The Court: I don't think his testimony is material to the Government's case.

Mr. Reinhardt: Well, to the question of entrapment.

The Court: Well, that is up to you.

The general instruction on failure to call a witness—the idea is that if it is shown that a person can give testimony which is material to the case and is available to a side, and is not called by that side, then the presumption is that he would not have testified in favor of the party who failed to call him.

Now, I can give you that instruction if you want it, but the Government—I do not think that his testimony was material to the Government's case.

Mr. Reinhardt: Well, your Honor, if the defense is entrapment, and——

The Court: You've got to make up your mind whether or [fol. 139] not it is material.

Mr. Reinhardt: There are three people. I think that it is material to that.

The Court: Then you've got to make up your mind whether or not you are going to call him.

Mr. Reinhardt: In view of the fact that he is, as far as I know now, and was then a confidential agent of the Government, it seems to me, once you set up a conflict of testimony between the defense and the Government, there is only one other person there who has the information.

The Court: You've got to make up your mind whether you want to call him or not.

Mr. Reinhardt: If I call him, will he be called as a hostile witness?

The Court: I don't know whether he will be hostile or whether he won't. I can't tell until he testifies.

Mr. Reinhardt: Just to be clear on this, what instruction would your Honor give, would you say?

The Court: Well, I don't intend to give any at the present state of the case. You may want to call him or you may not. The Government may then want me to give the instruc-

tion as to the witnesses that are available to either side; and if one has testimony which you consider material, and you fail to call him, in that event it would be against you.

So you've got to make up your mind whether or not you [fol. 140] are going to call him.

Mr. Reinhardt: All right, your Honor.

I haven't had an opportunity to talk to that witness yet. He was just produced for the first time this morning at 10:00 o'clock.

May we have a recess or something, so I can?

The Court: Have you got some other witnesses?

Mr. Reinhardt: The only other possible witness is the defendant, and I don't know whether he will take the stand or not. I assume he probably will, since—and I'd like to state now for the record the only reason I'll put the defendant on the stand is because the testimony as to previous convictions was admitted over my objection, and that I don't feel that my question as to whether he was engaged at that time in the traffic of drugs called for and supported the answer that there was a conviction 11 years before; and that's the reason that I'm now putting the defendant on the stand.

The Court: That's the question that you've got to make up your mind on. When you put him on the stand, you take the risks.

Mr. Reinhardt: No, but I want to state for the record that the reason I'm putting him on the stand is that the risk is now lessened because the fact of his previous conviction has already been called to the jury's attention, and that I consider that that was done—well, I consider that my ob- [fols. 141-143] jection to that should have been sustained.

The Court: You could make an argument as well as you could by testimony. I'm not arguing with you one way or the other. It's up to you to determine whether or not to call the defendant.

Mr. Reinhardt: But I would not ordinarily have wanted this fact to be called to the jury's attention, and for that reason I would not have put the defendant on the stand, and if I now put him on the stand, it is because that fact has already been called to the jury's attention and their information. I am saying this in the event of an appeal. I don't want to have waived my right to point out this fact by call-

ing him, and having the court say that, in any event, they could have asked him because I called him. I want to make it clear that I'm calling him only because he has already been asked.

The Court: I don't care what you do.

Mr. Reinhardt: I know. I just want to put in my record.

* * * * * * *

[fol. 144] Los Angeles, California, Wednesday, August 6, 1958. 2:25 P.M.

* * * * * * *

Mr. Reinhardt: Your Honor, the defense would like to call as its first witness Mr. Singh.

Mr. Bevan: I think, Mr. Bailiff, he is right outside the courtroom.

The Court: Did you examine the instructions?

Mr. Reinhardt: Yes, I did, your Honor. Would you like me to——

The Court: Will you have any exceptions?

Mr. Reinhardt: Yes, your Honor, one.

The Court: We will discuss it out of the presence of the jury.

Roy Stevens Singh, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

* * * * * * *

[fol. 145] Direct examination.

By Mr. Reinhardt:

Q. Mr. Singh, have you had any conversation with me prior to this moment?

A. Yes, I did.

Q. Would you tell the jury the nature of that conversation?

Mr. Beven: Objected to. I see no relevancy to it, whatsoever, your Honor.

The Court: Objection sustained.

Mr. Reinhardt: May we approach the bench, your Honor?
The Court: Yes.

(Thereupon, the following proceedings were had at the bench:)

The Court: Incidentally, the record will show that the defendant is present in approaching the bench and has been on all occasions throughout the trial when counsel approached the bench to discuss matters outside of the hearing of the jury.

Mr. Reinhardt: Your Honor, I would like to make this man a hostile witness, and I would like to show that he refused to discuss the case with me and that, in so doing, he was advised of his rights not to discuss this case with me by the United [fol. 146] States Attorney; that he has been in full conference with the Government and the Government's witness since he has been in the courtroom today, and that his entire actions in connection with this case have been at the behest of the Government.

The Court: I don't think that is material. I mean, I don't know. The way to determine whether or not a witness is a hostile witness is for you to ask him questions.

Mr. Reinhardt: How——

The Court: I don't know what questions you want to ask him. I don't know what is in your mind.

Mr. Reinhardt: I want to show he is unwilling to talk to me, unwilling to supply me with any information so that I could determine whether or not he was a hostile witness. I want to show that he was advised in that by the Government.

The Court: I don't think you can do it in this fashion. You have got to ask him questions, and then, if he refuses to answer them or if he evades them or shows hostility on the witness stand, this is the test, now, when he is on the stand. It isn't when he is out in the hallway or someplace else.

Mr. Reinhardt: As I understand the rule, your Honor, the hostility of a witness is determined by all the circumstances involved in connection with his appearance in the court. That is my understanding, and if your Honor disagrees, that's your Honor's ruling.

The Court: I can't tell by what conversations you had [fol. 147] with him before.

Mr. Reinhardt: That's only part of what I want to show, your Honor. I want to show all the circumstances involved

in connection with his appearance before the court at this time, what his contacts were with the parties, how he behaved toward the parties, how he got here.

The Court: How he behaved what?

Mr. Reinhardt: What his relations were with the various parties prior to this time in connection with his appearance in court, in what manner he was brought into court, and the dealings he has had since he has been in the courtroom. And my understanding is that that is material.

The Court: The question you had, now, is what conversations he had with you before court. I can't determine by that whether he is hostile or whether he isn't.

Mr. Reinhardt: You say that is not relevant to such a determination?

The Court: Not at this stage of the proceeding. It might become, later. He hasn't been asked any questions except that one, and I can't determine the hostility from that.

Mr. Reinhardt: No. I didn't ask your Honor to determine the hostility on the basis of that.

Mr. Bevan: That would be the only relevant purpose.

Mr. Reinhardt: I intend to use that as a part of a chain of evidence.

[fol. 148] The Court: Well, the only difference between a hostile witness and another witness is that you're allowed to cross-examine a hostile witness; that is all.

Mr. Reinhardt: That's right.

The Court: So you start out and ask him some questions, and if it appears that he is hostile, then I can determine from his attitude now on the witness stand his hostility, and if then it becomes material, all the rest of this doesn't go to hostility. All you can do is cross-examine him——

Mr. Reinhardt: Yes, and impeach him, your Honor.

The Court: You can cross-examine him, and all the rules of evidence apply.

So why don't you ask him some questions?

Mr. Reinhardt: All right.

The Court: The objection to the one question is sustained.

Mr. Reinhardt: I feel that my other questions will be objected to when I try to show the man's prior record and what his connection is with the narcotics traffic, which I think I would be entitled to show if he were a hostile witness.

The Court: Well, I don't know. The only mention of this witness so far is that he was present when Lienanan met the

defendant. Now, that's the whole framework of reference up to this moment.

Mr. Reinhardt: That's right, that he initially met the [fol. 149] defendant alone, and then brought him out.

The Court: Why don't you ask him——

Mr. Reinhardt: All right, we can continue.

The Court: —If he knows the defendant, if he knows Licuanan, if he knows so and so. He may not be hostile. I don't know.

(Whereupon, proceedings were resumed in open court as follows:)

By Mr. Reinhardt:

Q. Mr. Singh, did you accompany——

The Court: Do you know the defendant in this case?

The Witness: Yes, I do

By Mr. Reinhardt:

Q. When did you meet the defendant in this case?

A. On April the 24th or 28th, that is, 1958.

Q. Were you accompanied by any other person at that time?

A. By Agent Licuanan.

Q. Pardon me?

A. By Agent Licuanan.

Q. Did you first see the defendant alone?

A. Yes, I did.

Q. Did you have any conversation with the defendant at that time?

A. I showed him a letter of introduction which I had, stating my name and what my business was there.

[fol. 150] The Court: Did he keep the letter?

The Witness: No, he returned the letter to me.

The Court: Do you have it?

The Witness: No, I don't, sir.

I met him in the back of his house, and then we went to the front and sat on the steps, and I told him that we wanted to make a purchase of some heroin, and that Mr. Licuanan was the buyer, he had the money, he was the man, and that I wanted him to talk to him.

So I introduced Mr. Saldana to Agent Licuanan.

The Court: What did you say when you introduced them?
The Witness: Well, I just—I don't remember the name that I gave for Mr. Licuanan, but I went through the motions of introduction by stating that that was the man with the money and he was going to do the buying.

By Mr. Reinhardt:

Q. And you say you don't remember the name that you gave; is that correct?
A. That's correct.

The Court: That he gave to Mr. Licuanan?
Mr. Reinhardt: Yes.
The Court: You did not tell him his name was Licuanan?
The Witness: No, I did not, sir.

By Mr. Reinhardt:

Q. You do remember the name you used?
A. I used?
[fol. 151] Q. Yes.
A. Yes, I do.
Q. What name was that?
A. Roy.
Q. Did you tell the defendant your last name?
A. No, I didn't.
Q. Did you tell the defendant that you—Was the letter of introduction you brought to the defendant from Julio Contreras?

Mr. Bevan: If he knows, your Honor. I think the question assumes that, I suppose.
The Court: Yes.
The Witness: I assumed it was from Julio.

By Mr. Reinhardt:

Q. You didn't read the letter that you brought him?
A. Yes, I did.
Q. Was it signed "Julio Contreras"?
A. Yes, it was.
A. Yes, it was.
Q. Was Julio Contreras in jail——
A. He was.

Q. —if you know?
A. Yes, he was.
Q. Did you tell the defendant that the reason you wanted to get drugs was in order to raise money to get Julio Contreras out of jail?

[fol. 152] Mr. Bevan: Objected to as leading, your Honor.
The Court: Sustained.

By Mr. Reinhardt:

Q. Are you an employee of the United States Government?

Mr. Bevan: Objected to as calling for a conclusion of the witness, and leading.
The Court: Sustained.

By Mr. Reinhardt:

Q. Will you describe for the jury your present relations with the United States Government?

Mr. Bevan: Objected to as too remote, your Honor.
The Court: Sustained.

By Mr. Reinhardt:

Q. Are you presently engaged in narcotic activity on behalf of the United States Government?

Mr. Bevan: Objected to as argumentative, irrelevant and immaterial.
The Court: Objection sustained.
Mr. Reinhardt: Your Honor—
The Court: Did you receive any money for introducting Mr. Licuanan to the defendant?
The Witness: No, sir, I didn't.

By Mr. Reinhardt:

Q. Did you receive any narcotics for introducing the defendant to Mr. Licuanan?
A. No, sir, I didn't.
Q. Do you presently take narcotics, yourself?
A. What is that?
[fol. 153] Q. Do you use narcotic drugs?
A. I have used, yes.

Q. Do you presently use narcotic drugs?
A. Presently, no.

Mr. Reinhardt: May we approach the bench, your Honor?
The Court: Yes.

(Whereupon, the following proceedings were had at the bench:)

The Court: The record will show the defendant is present at the bench.

Mr. Reinhardt: Your Honor, the defendant has requested that I ask the witness—that I ask for a physical showing from the witness of his arm, to determine whether or not he does presently take narcotic drugs.

The Court: I don't know how conclusive that would be.

Mr. Bevan: I think it would be too remote because there is no foundation here to show that a person who is currently using narcotic drugs, you can tell the difference between the scar that is a week old or 10 days old and one that's a year old.

Mr. Reinhardt: Well, if your Honor would like, I can attempt to get an expert witness to—

The Court: I don't want anything. I mean, I'm just the judge. But there is no basis of fact now for any physical examination.

[fol. 154] Mr. Reinhardt: I ask the court to take judicial notice of the fact that the determination can be made of the difference between recently inserted—or recent holes in an arm, and holes that have been there over a year or so, or over a lengthly period of time.

The Court: I think you would have to establish the foundation for that.

Mr. Reinhardt: Before I ask the witness to show his arm?

The Court: Yes, sir.

Mr. Reinhardt: Your Honor, I don't have to take specific exceptions to these rulings; they are all preserved?

The Court: Everything is preserved, yes.

Mr. Reinhardt: Thank you.

The Court: Your question is—what do you want?

Mr. Reinhardt: What I wanted in my motion was to ask the defendant to show his arm so that I can determine——

Mr. Bevan: You mean the witness.

Mr. Reinhardt: Yes—the witness to show his arm, so that I can determine whether he is presently using narcotic drugs.

Mr. Bevan: I think that is perhaps an examination that should not be conducted upon the stand. If counsel wants to see his arm someplace——

The Court: He would have to establish a foundation for it now——

[fol. 155] Mr. Bevan: Yes, your Honor.

The Court: ——have to establish a foundation for it, and none is established.

The motion is denied.

(Whereupon, proceedings were resumed in open court as follows:)

The Court: How long has it been since you—what is the phrase—kicked?

The Witness: Yes.

The Court: Have you kicked? That is, have you stopped?

The Witness: Yes.

The Court: How long ago?

The Witness: Oh, it's been about three or four months now.

The Court: Three or four months.

By Mr. Reinhardt:

Q. Was that prior to the time of May 28th—April 28, 1958?

A. Prior to that?

Mr. Bevan: I'm not so sure the witness knows the meaning of the word "prior."

The Court: Was it before April 28th?

The Witness: Yes, it was.

By Mr. Reinhardt:

Q. When you accompanied Mr. Saldana out to the car, with Agent Lienanan, did you overhear the conversation that then took place?

[fol. 156] A. Well, after I introduced them, I told him that he was the man that was going to buy.

Mr. Licuanan asked him how much it would be for an ounce.

He said it would be about two hundred dollars.

So he said, "Well, I've got about four hundred; maybe we could pick up two ounces?"

So he told us to wait a few minutes outside, and he went in and made a phone call. Then he came back and told us that the purchase could be made later on that same evening, about 8:00 o'clock.

Q. Have you discussed your answers to these questions with the United States Attorney or Mr. Licuanan since you have been in the courtroom today?

A. My answers, sir?

Q. Yes.

A. No, I have not.

Q. Have you discussed the testimony you are giving now?

A. No, sir.

Q. Have you had any conversations——

The Court: Not today?

The Witness: No, sir.

By Mr. Reinhardt:

Q. Have you had any conversation with these gentlemen today?

A. Yes, I have.

Q. Was that related to this case?

[fol. 157] A. Just as far as my rights were concerned.

Q. As far as your rights were concerned? I'm sorry; I didn't hear.

Mr. Bevan: Could the reporter read it back, please.

(The last answer was read.)

By Mr. Reinhardt:

Q. Did they advise you as to your rights?

Mr. Bevan: Objected to as immaterial and irrelevant, your Honor. I don't see how whether this person was advised of rights has too much bearing upon this.

The Court: Overruled.

The Witness: What was the question, sir?

The Court: What did they tell you about their rights—that's what counsel means—about your rights?

The Witness: Well, they asked me—that you might want to talk to me, and that it was up to me to discuss the case with you, if I wanted to or not.

By Mr. Reinhardt:

Q. It was up to you to discuss it with me if you wanted to or not?

The Court: It is up to you to determine—
The Witness: Determine.
The Court: —whether or not you would discuss it?
The Witness: Yes.

By Mr. Reinhardt:

Q. Were you also advised, when I asked you to go out into the hall, that that decision was also up to you? Did [fol. 158] the United States Attorney advise you of that fact also?

A. Yes, he did.

Q. Did you then refuse to go out in the hall and discuss it with me?

A. Yes, I did.

Q. Have you been arrested in the last six months for a narcotic violation?

Mr. Bevan: Objected to, your Honor.
The Court: Objection sustained.

By Mr. Reinhardt:

Q. Have you been promised anything by the Government in connection with your testimony in this case?

A. I have not.

Q. Have you received any compensation from the Government in connection with this case?

A. I haven't.

Mr. Reinhardt: May we approach the bench again now, your Honor?
The Court: Yes.

(Whereupon, the following proceedings were had at the bench:)

The Court: The record will show the defendant is present at the bench.

Mr. Reinhardt: I didn't want to ask in front of the [fol. 159] jury before asking your Honor first whether I'm entitled to ask the defendant——

Mr. Bevan: Witness.

Mr. Reinhardt: Witness—the witness whether he has a record of convictions of narcotic violations.

The Court: The only question which is permissible is whether or not he has ever been convicted of a felony. That goes solely to his credibility. And if the defendant takes the stand, that is all that can go to. I will so instruct the jury, as you know.

Mr. Reinhardt: Yes.

(Whereupon, proceedings were resumed in open court as follows:)

By Mr. Reinhardt:

Q. Have you ever been convicted of any felonies?

A. I have.

Q. Will you tell the jury and the court the nature of the offense for which you were convicted?

A. Possession of heroin and marihuana.

Q. Were those separate offenses or was that just one?

A. Well, just both—

The Court: One offense.

The Witness: One offense.

By Mr. Reinhardt:

Q. That is your only conviction of a felony?

[fol. 160] A. And conspiracy.

The Witness: No, it was a different case, conspiracy.

The Court: Two different cases?

The Witness: Yes.

The Court: All in the same case?

By Mr. Reinhardt:

Q. What was the date of your last conviction? Just the year; the year will be sufficient.

A. January 18, 1954.

Mr. Reinhardt: May I have one moment, your Honor.

The Court: All right.

(Pause.)

By Mr. Reinhardt:

Q. Would you explain the circumstances leading up to your making contact with Mr. Saldana?

Mr. Bevan: I think that's a little irrelevant.
The Court: It's sort of vague and indefinite.
Mr. Reinhardt: Well, all right.

Q. When did you first determine to contact Mr. Saldana?

Mr. Bevan: Objected to. It calls for a conclusion of the witness.
The Court: Overruled.
The Witness: May I have that question again, please?

(Pending question read.)

A. I just can't remember for sure.

By Mr. Reinhardt:

Q. Was it your own idea to contact Mr. Saldana?
[fol. 161] A. (No answer.)

Mr. Reinhardt: I have no further questions, your Honor.
The Court: Cross?
Mr. Bevan: Yes, your Honor.
I would like to have this marked as Government's next exhibit in order, No. 6.

(Exhibit referred to was marked Plaintiff's Exhibit 6 for identification.)

The Clerk: Exhibit No. 6 marked for identification.
Mr. Bevan: A white piece of paper.

(Document shown to defense counsel.)

Cross-examination.

By Mr. Bevan:

Q. I am placing Government's Exhibit No. 6 for identification in front of you, Mr. Singh. Please examine that document.

A. (Witness complies.)

Q. Is that letter, Exhibit No. 6 for identification, the letter which you showed to defendant Saldana on April 28th?

A. It is.

Mr. Bevan: I offer Exhibit No. 6 in evidence, your Honor.

The Court: Admitted.

(Exhibit heretofore marked Plaintiff's Exhibit 6 was received in evidence.)

* * * * * * *

[fol. 162] LEONARD SALDANA, the defendant herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Leonard Saldana.

Direct examination.

By Mr. Reinhardt:

Q. Mr. Saldana, will you tell the jury, as well as you can remember, the circumstances that took place on the afternoon of April 28, 1958, that are involved in this case today?

A. The informer came to me, telling me that he had come [fol. 163] from the County Jail.

The Court: Can you hear that?

They can't hear you back there.

If you will go over to the end of the jury box, there's a little leaner on there that you can lean on, and you can tell whether or not the jury can hear. Do you want to pull it up?

You can lean on that, but not as hard as the other kind, counsel. All right.

Now, what was the question?

(The last question was read by the reporter, as follows:

("Q. Mr. Saldana, will you tell the jury, as well as you can remember, the circumstances that took place

on the afternoon of April 28, 1958, that are involved in this case today?")

The Witness: The informer came to me——

By Mr. Reinhardt:

Q. Excuse me, Mr. Saldana. When you refer to people, will you also mention their names; will you identify the person you are speaking about?

A. Yes. Well, this fellow George came to me and said that he had come from the County Jail——

Q. Excuse me again.

Your Honor, I think this would be unclear.

Q. Would you be able to identify George more, so that the jury will know who George is, in relation to the people [fol. 164] that they know in this case?

A. The informer, that's George, the man that just left the stand.

The Court: The man that has just left the stand?

The Witness: Yes, your Honor.

The Court: Go ahead.

The Witness: He came to me, telling me he had come from the County Jail where my cousin was at, and that he wanted to get out of jail, and that they didn't have no money to get him out on bail, but they did have a little money to buy some stuff with—meaning dope—and that they were going to sell this stuff in return and get some of that money and get him out on bail.

He also told me that he knew I knew Pancho, because Pancho is some dealer, dope salesman; that they knew I knew him, and wanted me to introduce him.

I told him, "I couldn't introduce you to him; it wouldn't do no good."

He said, "Well, how about making a contact with him?"

"I can't make no contact with him. He won't go for it. He'll get me hurt by just going to him and trying to buy dope and taking somebody else with me"—like he wanted me to. "I don't want to do that. I can't do it."

So then he went and talked to this other fellow here. He said—the officer—he said that he was the one that had [fol. 165] the money. Then he asked me if I could get some, and he also mentioned Pancho.

I told him that I didn't want to go to Pancho. I couldn't go to him. Well, to be truthful, I was kind of afraid. I didn't want to do it.

They asked me again.

I said, "Well, I might be able to get some; I don't know." He said, "Why don't you try?"

I said, "I don't know. Wait a minute." I was thinking it over.

And he said, "Well, will you try? Will you try?"

"Yes, I'll try." Finally I told him I would try, and I told him I had to make a phone call first, though.

I went and made the phone call, and I asked this other fellow, did he have some?

He said, "Yes."

I asked him, how much did he want for it?

The Court: This other fellow? Oh, on the phone?

The Witness: Yes.

The Court: All right.

The Witness: He said he wanted $200 an ounce for it.

Then I came back and I told the officer that I could get some for $200 an ounce, and that I wasn't going to make nothing on it, but since they were going to do a favor for my cousin, I was going to get it for him for the same price I was [fol. 166] going to get it.

And he said he had enough for two ounces. He said he had enough for two ounces, so then I told him to come back later that evening. And when they went, I made another phone call and I told the guy to bring me two ounces, that I was going to have the money for him; if I didn't have the money for him that day, I was going to have it for him the next day.

So, when the officers came back and picked up——

By Mr. Reinhardt:

Q. Mr. Saldana, that concludes the testimony as to the first meeting, which was all I was asking you at this time. Now, in the neighborhood in which you live, are you acquainted with a number of people who are engaged in the practice of trafficking in narcotics?

A. Yes, I know quite a few of them. I have known a lot of them from the penitentiary, and they liked me and trusted me and, well they knew I wasn't a stool pigeon or

informer, and they talked pretty freely to me in bars and places. I knew who they were. I could have gone to ten different places.

Q. There were a large number of people——

The Court: What was that last? You could have gone to ten different places?

The Witness: Yes: I knew quite a few of them.

The Court: Ten different places for what?

[fol. 167] The Witness: To make a purchase of narcotics.

By Mr. Reinhardt:

Q. These are all located in your immediate neighborhood?

A. They are.

Q. Although you knew of this, since your previous arrest for the possession of marihuana in 1947 had you had any narcotics in your possession, from 1947 to 1958?

A. No, I didn't have any in my possession.

Q. Had you had any dealings with narcotics between 1947——

A. No, I hadn't had no dealings.

Q. Were you willing, when the informant first came to you, did you freely of your own will agree to make a sale or to arrange for a sale of narcotics?

A. Well, at first I was afraid and didn't want to, but since they came to me and told me they came from Julio, from my cousin, and they were supposed to be his friends—I don't know; then I agreed. But at first I was afraid; I didn't want to do it.

Q. Why did you agree to do it when they told you they knew your cousin?

A. Because they told me they were going to help him, get him out on bail, wanted to do him a favor.

Q. Had you known your cousin for a long period of time?

A. Do I know him for a long period of time?

[fol. 168] Q. Yes.

A. Yes, since childhood.

Q. Is he a close personal friend of yours?

A. Yes, we were close, in a way.

Q. Did you make any profit at all out of this trafficking in narcotics?

A. No, I didn't make nothing on it. I believe the officer knew that.

Q. Do you now have a bank account?

A. No, I haven't.

Q. Do you drive an automobile?

A. No, I haven't got one.

Mr. Reinhardt: I have no futher questions.

The Court: Cross-examine

Cross-examination.

By Mr. Bevan:

Q. Have you ever been convicted of a felony, Mr. Saldana?

A. Yes, I have.

Q. How many?

A. Twice.

Q. When was the first one?

A. 1947.

Q. What was that for?

[fol. 169] A. Possession of marihuana.

Q. When was the second one? Was it in 1954?

A. Yes, 1954; auto theft.

Q. You knew then that there were laws against the—or laws punishing the sale of narcotics?

A. Yes, I did.

Q. You knew this at the time that you were talking to Mr. Licuanan?

A. Yes, I did.

Q. Now, you could have gone to ten different persons in your immediate neighborhood to buy dope, is that right?

A. Yes, I knew; I know quite a few of them people. They've talked pretty freely.

Q. Where do you—where did you live? At 445 South McBride?

A. South McBride, yes, East Los Angeles.

Q. Who did you purchase the narcotics from in this particular instance on April 28th?

A. Albert Palomino.

Q. Where does he live? He lives in Santa Ana, doesn't he?

A. Yes, he recently has just moved out there, but before that he lived on Camillo.

Q. Where is that with respect to your home?

[fol. 170] A. Well, it's East L. A. too, but I don't know how many blocks or miles it is from my home.

Q. Did he move to Santa Ana before or after April 28th?

A. Before.

Q. And you went—Why did you go to him when you could have bought from nine or ten other persons in your immediate neighborhood?

A. Because not too long ago he had told me that if anybody ever asked me, knowing me and trusting me and knowing that I wasn't going to deal with somebody that was wrong—that if anybody asked me, that he had some, and that he would give me a break on it if I ever came to him. And that's why I called him, because I figured it was a sure thing, since he had—recently he had told me he had some.

The Court: Now, you say these nine or ten other numbers of people trusted you and knew that you wouldn't be an undercover agent, let us say?

The Witness: Yes.

The Court: What do you mean when you said that Palomino knew that you wouldn't deal with anybody that was wrong? What do you mean by "wrong"?

The Witness: Well, the guy knew me, and he figured that —well, he figured me for all right; he knew that I wasn't a stool pigeon or an informer, and that——

The Court: And that you wouldn't deal with any officer?

[fol. 171] The Witness: Yes.

The Court: Is that what you mean?

The Witness: I guess so, yes.

By Mr. Bevan:

Q. Do you know what Mr. Palomino meant when he said that he would give you a break?

A. Yes.

Q. What did he mean by that, sir?

A. That he'd give it to me cheap.

Q. Is $200 an ounce cheap?

A. I don't know. He told me he was selling it for two fifty and three hundred, and if he gave it to me for two hundred, well, I could make something on it.

Q. You actually thought, at the time you were dealing with Mr. Singh, the witness who just left the stand, and Agent Licuanan, that they were dope peddlers, did you not?

A. Yes, that's what they told me, they having come from this other guy, Julio, who was in jail for dope at the time. I just figured it was all the same clique, the same people.

The Court: Was Julio in jail for a narcotic violation?

The Witness: Yes, sir. That's what they told me.

By Mr. Bevan:

Q. You felt they were friends, then, of Julio?

A. Yes.

Q. You felt that they would be able to get Julio out on bail?

[fol. 172] A. Yes.

Q. And you wanted that, or didn't mind it, at any rate?

A. Well, just try to help him to get out on bail, since that's what he wanted.

Q. That frame of mind that you had on April 28th, was that the same frame of mind you had on May 7th when you further dealt with Agent Licuanan?

A. Yes; well, they told me that they had—he told me that he didn't have all the money yet and was still working on it, but that he thought it was going to be hard to get him out, but they were still trying.

Q. Who was this, when you say "he"?

A The officer.

Q. Who is sitting here, Agent Licuanan?

A. Yes.

Q. Is that what he told you on May 7th?

A. Yes.

Q. Was anybody else present at this time?

A. No.

Q. And his statements to you were the reasons why you sold narcotics to him?

A. His statements what?

Q. Well, the fact that Mr. Licuanan was still supposedly trying to get Julio out on bail, that was the only reason you sold narcotics to him on May 7th?

[fol. 173] A. That was the only reason, because I wasn't making no profit on it.

Q. Did you tell him that you were making little or no bread on these transactions?

A. I told him that I wasn't making nothing on it. And he told me not to worry; later on he was going to fix me up, he was going to give me a little something.

The Court: Did you use the term "bread"?

The Witness: No. I said I wasn't making nothing on it.

The Court: Did you use the term "piece"?

The Witness: Yes.

By Mr. Bevan:

Q. You knew what the term "piece" meant?

A. Yes.

Q. What does that mean?

A. One ounce of stuff.

Q. Of stuff. What does "stuff" mean?

A. Dope.

Q. By "dope," you mean heroin?

A. Yes.

Q. You are quite familiar with the terms that are employed in the narcotic trade?

A. I was in the penitentiary with a bunch of hoodlums and dope peddlers, and you just learn that as you go. You learn all of it, that and a lot more.

[fol. 174] The Court: Did you see Mr. Singh, the man who was on the witness stand before you, again after April 28th?

The Witness: No, I never did.

The Court: Until he appeared in the courtroom?

The Witness: Yes.

The Court: That's the first time?

The Witness: Yes, your Honor.

By Mr. Bevan:

Q. At the time you first dealt with Agent Licuanan, did you tell him that you had just met——

Mr. Bevan: Excuse me. Withdraw that.

Q. Did you tell him at that time that you had just sold 20 ounces of narcotics the day before?

A. No, I didn't. I thought of bringing that up, too. I didn't tell him nothing about having made no sales before that.

Q. At the time that you told Agent Licuanan you were making no money on these transactions, you were just trying to impress him with the fact that he was getting his dope cheap, weren't you?

A. No, not exactly.

Q. What do you mean, "not exactly"?

A. Well, I was just trying to show him where I wasn't making nothing, just wanted to help my cousin out, that's all.

Q. Is it true, Mr. Saldana, that after Mr. Licuanan had obtained narcotics from you on certain occasions, that you [fol. 175] asked him when he would be back again?

A. Yes, I believe in the conversation, yes, I did ask, or I said, was he going to come back?

Q. Did you ask that on more than one occasion?

A. I remember asking it. I don't remember if it was one or twice or how many times. I do remember asking, was he going to come back, or—yes, I did ask that.

Q. On more than one occasion?

A. I don't think so, no.

Q. Do you remember?

A. I do remember asking, but I don't remember if it was more than once.

Q. Why were you so interested in that?

A. Just to find out if he was going to come back; just conversation.

Q. You didn't mind at all helping Mr. Licuanan and Julio Contreres out, did you?

A. No, just—I wasn't thinking of helping him, really; I was just thinking of helping Julio.

Q. If the same situation occurred again, you wouldn't mind doing that, would you?

A. Huh, I wouldn't—right now, on a deal like that, I wouldn't help my mother.

Q. I can understand.

Did you tell Mr. Licuanan, at the time of your first [fol. 176] meeting with him that, "Why deal with Pancho? I know Pancho's source of supply"?

A. That's something else. That's something else. I didn't say that. I said I didn't want to go to Pancho. I

didn't want to go to him, because he would have gotten me and him hurt, both.

Q. What do you mean by "hurt"?

A. Well, he's known to be a rough character.

Q. Why do you think he would have gotten you and Mr. Lieuanan hurt?

A. Because I have never had no dealings with him; I've never bought nothing from him. And coming up there and trying to buy, with somebody else, just—the people don't do things like that.

Q. You know how they do deal in the narcotics trade?

A. Again I'll tell you I've been in the penitentiary, and you learn all that up there. You don't have to have experience in it; just by going up there, you hear all those things.

Q. Now, on April 28th, when did you obtain the narcotics, the two ounces of narcotics?

A. I made a phone call, and he brought them to me, to my house.

Q. Where you lived?

A. Yes.

[fol. 177] The Court: Who is Pancho?

The Witness: Oh, some other fellow from the East Side.

The Court: What is his last name?

The Witness: I don't rightly know his right name—his last name.

The Court: You don't rightly know his last name?

The Witness: No.

The Court: Do you know him when you see him?

The Witness: Yes.

The Court: Have you seen him in the courtroom since this trial began?

The Witness: No, I haven't.

The Court: Have you seen him since you were arrested?

The Witness: No, I haven't.

By Mr. Bevan:

Q. Do you know his address?

A. No.

The Court: Is Palomino also known as Pancho?

The Witness: No, I don't think so.

By Mr. Bevan:

Q. So far as you knew, they were two different people?

A. Yes.

Q. At the time you were dealing with Agent Licuanan—

Mr. Bevan: Strike that.

Q. On how many occasions did you sell narcotics to Agent Licuanan?

[fol. 178] A. Four times.

Q. First on April 28th; is that right?

A. Yes.

Q. Second on May 7th?

A. Yes.

Q. Third on May 13th?

A. I guess so. The exact dates, I don't remember.

Q. Yes. And the last was on the day you were arrested?

A. That was no sale.

Q. That was no sale.

Now, you knew that you were doing wrong, didn't you, at the time you were selling these heroin exhibits?

A. Yes, I knew there was a lot of wrong involved in it.

Mr. Bevan: No futher questions.

The Court: Redirect?

Mr. Reinhardt: No futher questions.

The Court: Step down. Thank you Mr. Saldana.

(Witness excused)

Mr. Reinhardt: Defendant rests.

The Court: Defendant rests.

Mr. Bevan: No rebuttal, your Honor.

The Court: Government rests?

Mr. Bevan: Excuse me. Just may I confer for just one moment. (Pause)

No rebuttal, your Honor.

[fol. 179] The Court: Government rests?

Mr. Bevan: Government rests.

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Mr. Bevan: Exhibits 1 through 4 and 6 for the Government are in.

The Court: All through 4 were admitted; 5 was marked for identification, and 6 was admitted just now.

On the instructions, you say you have an objection?

Mr. Reinhardt: I have one question and one objection.

The Court: Question?

Mr. Reinhardt: Is it your Honor's intention to give [fol. 180] Instruction No. 39 in Judge Mathes' list of instructions?

The Court: That is covered in this "specific intent" that I have had, that I gave you.

Mr. Reinhardt: That's fine. The only reason I mentioned that was that, at the beginning, it spoke in terms of major crime, and I don't think your instruction speaks in those same terms.

The Court: No. No; this "specific intent" is covered by the instruction which I give on the sale of heroin.

Mr. Reinhardt: The only other objection I have, your Honor——

The Court: And you request the entrapment instruction.

Mr. Reinhardt: Well, I have a proposed entrapment instruction which I have drafted, which I find infinitely preferable. I think that my instruction, your Honor, is more in accordance—I know that instruction was based on the cases up through the Sorrell case, or mainly relying on the Sorrell case, and I think that my proposed instruction is more in accordance with the spirit of this year's Supreme Court decision in the case of Sherman v. United States and, I think it is, Masciale—I'll have to find the spelling for you—Masciale is one.

The Court: Have you got the citation?

Mr. Reinhardt: Yes, I have the cases.

The Court: Let me get the books.

[fol. 181] Is this the Supreme Court Reporter or U. S. Supreme Court——

Mr. Reinhardt: U. S. Supreme Court Reports.

The Court: Does this have the official—Yes. 356 U. S., Masciale v. U. S.

Mr. Reinhardt: The Sherman case is the latest one, your Honor.

The Court: Sherman. That is likewise 356 U. S., Sherman v. U. S.

Mr. Reinhardt: Actually, your Honor, I don't think my instructions are radically different. If you would like, I can show them to you and the U. S. Attorney.

The Court: Oh, yes, sure. Show him a copy of your proposed instruction on entrapment.

I think that this Judge Mathes instruction on entrapment has been approved by the Ninth Circuit; that is my recollection, but I don't recall the case. In any event, I think it states the law clearly and succinctly and briefly.

Mr. Reinhardt: Your Honor, I would object particularly to the distinction between lawful entrapment and unlawful entrapment. In my view, entrapment is a legal defense, and there is no such thing as lawful entrapment. If it is entrapment, it is unlawful. And I think that the instruction that I have drawn would avoid that.

The Court: Of course, in your Sherman case, as in [fol. 182] Sorrell v. U. S., this court firmly recognized the defense of entrapment in the Federal courts. The intervening years have in no way detracted from the principles underlying that decision.

Now, this definition of "entrapment" prepared by Judge Mathes, as you say, is based upon the Sorrell case.

Mr. Reinhardt: Yes. I said, your Honor, that I thought this was more in conformance with the spirit of that opinion, which generally——

The Court: I haven't seen your proposed instruction. If I can see it, I can tell you whether or not I'll accept it.

Mr. Bevan: I haven't finished reading it.

The Court: Oh. Haven't you got an extra copy for him?

Mr. Reinhardt: No. I just had this done at lunchtime, and I had to go back to the office and have my secretary prepare it.

The Court: Well, you finish reading it.

(Documents handed to the court.)

The Court: I think that the same things are covered, in different language and in a different way of saying them, in Judge Mathes' Instruction No. 56.

Mr. Reinhardt: Well, may I offer this for the record?

The Court: This will be defendant's proposed instruction, and it will be refused, and you may have an exception to it.

[fol. 183] Mr. Reinhardt: Thank you.

The Court: And that will be filed as the defendant's proposed instruction.

Mr. Reinhardt: As I remember Judge Mathes' instruction, I don't recall any part that would be applicable to the continuing scheme. I may be wrong on that.

The Court: There is no continuing scheme here, I dismissed the conspiracy count.

Mr. Reinhardt: No, I don't mean that, your Honor, but I mean instruction along the lines that if the jury finds that the three sales subsequent to the first sale resulted from a common scheme or a scheme planted in the defendant's mind by the Government, that then, in that event, if they acquit him on the first, they should then acquit him on the remaining three.

The Court: I don't think that is the law.

I will give the defense of entrapment, and you can argue the defense of entrapment as to each count, because it becomes a question of fact for the jury to decide whether or not the scheme originated in his mind, or he was merely given an opportunity to commit a crime by the Government, or if the Government induced him to commit an offense which he was unwilling to commit. And I think it becomes a matter of argument, and therefore this instruction is applicable and covers it.

There will be an instruction that the jury must find a [fol. 184-185] verdict as to each count.

Mr. Reinhardt: Fine.

The Court: Do you have any other exceptions?

Mr. Reinhardt: No, your Honor.

The Court: None to the general instructions?

Mr. Reinhardt: No.

The Court: Does the Government?

Mr. Bevan: No, your Honor.

* * * * * * *

[fol. 186] (Whereupon, at 3:38 p. m., the jury retired from the courtroom, and the following proceedings were had in the absence of the jury:)

The Court: On this instruction on entrapment, I intend to add the following sentence:

"You will consider the defense of entrapment as to each count separately."

Then it is a matter for your argument if you contend that there was entrapment after an original entrapment.

Mr. Reinhardt: Your Honor, I wonder whether we couldn't have a little bit more than that and tell them that, if they find that there was a common scheme, that these events did constitute a common scheme, and that they all stemmed from this initial conversation, and if they find that to be entrapment, then they would find that they all were. I think, in the Sherman case, that was the situation.

I'll have to look at it. (Pause)

I'll withdraw that last remark. I don't know that that was the situation in the Sherman case. But, nevertheless, [fol. 187] I would still request these certain instructions.

Mr. Bevan: The Government would object to such instruction. I have delayed my remarks until now because I was thinking about it, your Honor, but I do think that such an instruction would be not only unfair to the Government but incorrect.

The Court: Which one?

Mr. Bevan: The one that counsel just proposes, about a taint arising at the first one which attached to all subsequent transactions. If that were true, why, say there was one transaction that the Government might have enticed a person into, any other criminal conduct he would engage in perhaps might be said to have arisen because of that first transaction.

The Court: Well, I am trying to draw one now which I think I will announce to you in a moment.

Mr. Reinhardt: Your Honor, there is one futher point that I would like to ask for an instruction on. That is, that last night, I think right before the jury was withdrawn, the United States Attorney stated that the Government did not want to disclose the name of the confidential informant because to do so might place his life in jeopardy; and, subsequent to that, the Government withdrew that objection, but the jury still heard the remark that the witness' life might be in jeopardy.

[fol. 188] I think that that remark would be prejudicial to the defendant, and I would like the court to instruct the jury to disregard that remark.

Mr. Bevan: No objection to such an instruction by the court, your Honor.

The Court: Counsel, I am still of the opinion that the mere instruction to the jury, that you must consider the defense of entrapment as to each count of the indictment, is sufficient.

Mr. Reinhardt: Very well.

The Court: And I will give the other instruction:

"The jury are instructed to totally disregard any remark by the U. S. Attorney that the life or safety of any person might be put in jeopardy if his name was disclosed."

. . . . . .

[fol. 189] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before: Chambers, Barnes and Hamley, Circuit Judges

ORDER OF SUBMISSION—March 2, 1959

Ordered appeal herein argued by Mr. Herbert Bernhard, counsel for the Appellant, and by Mr. Bruce A. Bevan, Jr., Assistant U. S. Attorney, counsel for the Appellee, and submitted to the Court for consideration and decision.

[fol. 190] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before: Chambers, Barnes and Hamley, Circuit Judges

ORDER DIRECTING FILING OF OPINIONS AND FILING AND RECORDING OF JUDGMENT—December 7, 1959

Ordered that the typewritten opinion and dissenting opinion of Hamley, Circuit Judge, this day rendered by this Court in above cause be forthwith filed by the Clerk,

and that a judgment be filed and recorded in the minutes of the Court in accordance with the majority opinion rendered.

[fol. 191] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 16,233

LEONARD SALDANA, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Southern District of California, Central Division

Opinion—December 7, 1959

Before: Chambers, Barnes and Hamley, Circuit Judges

Chambers, Circuit Judge

The judgment of conviction is affirmed. We hold that the second judge of the United States District Court for the Southern District of California was legally justified sua sponte under the circumstances of this case in ordering the plea of guilty on the first and second counts withdrawn (which plea had been entered before another judge of the same court) and directing the entry of a plea of not guilty.[1] [fol. 192] Further, we are convinced that the trial after

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[1] Of the eleven authorized for the whole district, there are eight active district judges in the Southern District of California whose official station in the Central Division is Los Angeleles. Under the local rules, and by rotation, each judge presides over the criminal calendar for a period of three months. In turn, he is succeeded by another. The judge presiding over the criminal calendar normally receives all pleas and imposes the sentences on the guilty pleas. Ordinarily, he tries the short criminal cases. If his calendar does not permit him to hear the longer cases (over four days) he assigns them to other judges.

this change of plea, did not constitute double jeopardy [2] for the defendant.[3]

Here the first judge, presiding over the criminal calendar, on June 16, 1958, received a plea of not guilty from Saldana and his co-defendant, Albert Palomino. Trial was set by judge No. 1 to be held before judge No. 2 on July 15, 1958, a date within the upcoming term of service of judge No. 2 as presiding judge of the criminal calendar.

As the days for service of judge No. 1 on the criminal calendar grew fewer and fewer, Saldana appeared on June 26 before judge No. 1, withdrew his former plea as to counts one and two and entered a plea of guilty. At the suggestion of the district attorney, passing of sentence was postponed until after the trial of Palomino. The record shows quite clearly that the defendant wanted judge No. 1 to handle his case.

After postponements by judge No. 2, Palomino's trial was called for July 29. There was no trial on that date because Palomino had fled the jurisdiction. Shifting his attention to Saldana, judge No. 2 decided that he was not satisfied with the circumstances surrounding the plea of guilty on the first two of the five counts. Therefore, he entered the plea of not guilty for the defendant on counts one and two.

In making a very fine presentation of arguments of double jeopardy and of simple error as to the withdrawal of the pleas on counts one and two, counsel for appellant has overlooked Sinclair v. United States, 279 U.S. 263, and the

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[2] 5th Amendment to the Constitution of the United States: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *" See, thereon, the early leading case of United States v. Perez, 9 Wheat. 579.

[3] The claim of double jeopardy and a claim that judge No. 2 was not authorized under the statutes or Federal Rules of Criminal Procedure to change a plea by his unilateral act can only be addressed now to count two because there was an acquittal on count one. There was a conviction on counts two, three, four and five. The plea of not guilty on counts three, four and five was never withdrawn, never changed. Saldana did expect the district attorney to dismiss the indictment on counts three, four and five, but it never happened.

legion of cases following it, e.g., our case of Doan v. United States, 202 F.2d 674. Here in Saldana's case, his sentence on count two was concurrent with that of count three. The plea in count three was always "not guilty." And, count three seems amply supported by the evidence.

The fifth count, the subject of a ten year sentence for Saldana, only charged "sale and facilitation of sale." Obviously, under the testimony, Saldana was guilty of the [fol. 193] crimes of possession of and transportation of unstamped narcotics,[4] but he was not charged with those crimes. We are of the opinion that under the evidence (upon which defendant could have had upon request proper instructions as to the elements of sale) it was a question of fact for the jury whether there was a sale as charged in the fifth count.[5]

We have examined all specifications of error and find those not mentioned hereinabove to be without substance.

Counsel's excellent presentation just overlooks the fact that there was never any plea of guilty or motion to dismiss on counts three, four and five. So the court was justified in going ahead on those counts. Had the court been less abrupt in proceeding, but firm nonetheless, defendant surely would have wanted to withdraw the guilty pleas on the first two counts. The court not being willing to dismiss the last three counts, it would appear that what the court did was eminently fair.

Judgment affirmed.

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[4] Saldana was arrested with some five ounces of heroin in hand. Simultaneously, Palomino, also at the scene, was arrested. During the initial excitement of the announced arrest Saldana tossed the bag containing the heroin to the agent Licuanan who had negotiated the purchase. No money, on this occasion, ever changed hands. Appellant says there was no sale. The briefs of the parties ignore this last incident. They meet the issue of sale on the assumption that there was neither consideration nor delivery. The government's position is that earmarking the heroin for delivery constituted a sale.

[5] Our decision herein on the fifth count does not rest on the government's theory that "appropriation or segregation of goods for delivery" completes a sale. While one

[fol. 194] HAMLEY, Circuit Judge, dissenting:

I dissent from that part of the opinion which affirms the conviction on the fifth count. Saldana received a separate and independent sentence of ten years on that conviction.

In count five it is charged that on or about May 21, 1958, Saldana and one Albert Palomino "knowingly and unlawfully sold and facilitated the sale to Jayme Licuanan and Victor Segura of 10 ounces, 339 grains of heroin . . ." contrary to 21 U.S.C.A. §174. Licuanan is a Treasury Department enforcement agent assigned to the Federal Bureau of Narcotics. Segura is a Ventura County, California, deputy sheriff.

Appellant seeks to set aside the conviction on this count on the ground that there was no substantial evidence that he sold or facilitated the sale of the heroin referred to in this count of the indictment.

Accepting as true the evidence submitted by the Government, the following facts appear: Licuanan, using the name Salvador, was introduced to Saldana on April 28, 1958, by a confidential informant. The agent represented that he was interested in buying heroin. Saldana indicated that the price would be two hundred dollars an ounce. Transactions thereafter occurred between the two on that day and on May 7 and 13, 1958. Those are dealt with in counts 1 to 4 of the indictment.

On May 13, 1958, Licuanan told Saldana that the next time he would place an order for approximately five ounces.

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may think it improbable that Saldana, his arrest having been announced, intended to go ahead and complete the transaction. How can one know here as a matter of law what was in Saldana's mind when he threw the package to Agent Licuanan? And, if it is the state of his mind, it should be a jury question. And, as a jury man in appraising his state of mind one might remember that at the moment he parted with the package defendant beyond cavil had the guilty knowledge of having been caught with the possession of the unstamped narcotics and having been seen transporting it. At such a time, he in excitement might complete the transaction. To say as a matter of law what was in the mind of Saldana, the majority herein thinks invades the province of the jury.

Shortly thereafter, Licuanan told Saldana over the telephone that he, Licuanan, had been in contact with a man in San Francisco who wanted to pick up five ounces of heroin. Saldana said, "Well, whenever you're ready, give me a call, and I'll fix it up for you." Licuanan later sent Saldana a telegam from San Francisco stating that he, Licuanan, would be in Los Angeles at 1:00 p. m., on May 21, 1958, to "pick up" the five ounces.

At about 2:55 p. m., Licuanan and Segura arrived in a government automobile at a designated street address in East Los Angeles. The observed Saldana and Palomino in a station wagon, with Palomino in the driver's seat. Licuanan and Saldana got out of their respective cars and [fol. 195] approached each other. Licuanan told Saldana that Segura was Licuanan's uncle, and stated that the "uncle" and the "man in San Francisco" each wanted five ounces of heronin. Saldana said, "That's fine," and spoke briefly with Palomino, who then drove away.

Shortly thereafter Palomino returned in the station wagon and parked behind the government vehicle. Saldana walked over to the station wagon and got in the front seat next to Palomino. Both Licuanan and Segura observed Palomino pick up a brown bag and hand it to Saldana. Licuanan testified: "When I observed this, I believe I asked Saldana, if that was the stuff, and he said 'Yes,' at which time I then ran towards the car and I placed Saldana and Palomino under arrest. Then Saldana threw the paper bag to me and started running."

Another deputy sheriff who witnessed the incident testified that Saldana threw the brown bag at Licuanan after the latter had pulled his gun. The bag fell at Licuanan's feet and was later found to contain ten rubber tubes each containing heroin. Saldana was apprehended by other agents who were on the scene at the time.

The Government evidence, summarized above, indicates that there was at no time any passing of consideration to Saldana for the ten ounces of heroin involved in the May 21, 1958, transaction. Moreover, there was no physical transfer of the property from Saldana to Licuanan until after Saldana's arrest. The transfer which then occurred consisted of the throwing of the paper bag at Licuanan in

the presence of other officers immediately preceding Saldana's attempt to escape.

The Government contends, however, that the sale was completed when Palomino handed the paper bag to Saldana while the two were seated in Palomino's station wagon. The majority states that its decision as to count five does not rest on this theory. It is therefore unnecessary for me to state the reasons why I believe the Government's position in this regard is untenable.

It appears to be the view of the majority that the evidence would warrant a jury finding that when Saldana tossed the paper bag to Licuanan a delivery of narcotics was effected which consummated the sale. The Government [fol. 196] did not advance such a theory in its briefs or oral argument and, as the majority states, the briefs of the parties ignore the bag-tossing incident. It seems to me that, at the very least, appellant ought to be accorded an opportunity to present argument on this question before this court decides the case on this new theory.

I take it from footnote 5 that the majority recognizes that more than a physical transfer of possession had to be shown, for reference is made therein to Saldana's state of mind.

The state of mind necessary to effectuate a delivery pursuant to a contract of sale is a deliberate and voluntary intention to complete the transaction. This being so, I would think it close to a contradiction in terms to suggest, as the majority does, that "at such a time, he in excitement might complete the transaction." A transfer of possession made by accident (as where a farmer's cart full of apples overturns while passing a prospective buyer's establishment) is not a "delivery." Likewise, the prospective seller's transfer of possession to a buyer under great stress and excitement, cause by circumstances necessarily precluding successful completion of the transaction, is not in my opinion a "delivery."

The moment that Saldana was arrested at gun point he knew that Licuanan was not an ordinary customer. He also knew that Licuanan had never intended to make an ordinary purchase of narcotics. Saldana further knew that in any event a sale consisting of a delivery of narcotics and receipt of the purchase price could never be consum-

mated. Since Saldana had this knowledge before he threw the paper bag at Licuanan, the jury could not have reasonably found that this act was intended as a delivery pursuant to a contract of sale.

It was probably but an involuntary reaction under the stress of the moment or an effort to comply with what he construed to be a gunpoint demand for the bag. If he had any other purpose, it must have been to rid himself of the evidence or to distract attention while he attempted to escape. Any of these explanations fit with the established facts, but not the hypothesis that he was completing a sale for which he expected to be paid.

The state of Saldana's mind was a question of fact. The only direct proof of his state of mind is that which he him-[fol. 197] self furnished when he testified that this May 21, 1958, incident was not a sale. The jury, of course, was not required to believe Saldana. But the only other proof available was of a circumstantial nature consisting of what could reasonably be deduced from the surrounding circumstances. The facts as to these circumstances are not in dispute.

Answering the majority's question, one cannot know here as a matter of law what was in Saldana's mind when he threw the package to Agent Licuanan. But the question of whether the circumstantial evidence was sufficient to warrant a jury finding that Saldana intended by such act to complete the sale is a question of law. I find not a single circumstance surrounding the event which would tend to show that Saldana had a deliberate and voluntary intention of consummating the sale. In my view all of the facts reviewed above concerning the bag-tossing incident indicate that he could not have had such an intention. Considering the fact that the Government must prove each element of its case beyond a reasonable doubt, I am of the opinion that the conviction on the fifth count should be reversed.

[fol. 198] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 16,233

LEONARD SALDANA, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

JUDGMENT—December 7, 1959

Appeal from the United States District Court for the Southern District of California, Central Division

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

[File endorsement omitted.]

[fol. 199] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ORDER DENYING PETITION FOR REHEARING—February 18, 1960

On consideration thereof, and by direction of the Court, It is Ordered that the petition of Appellant, filed January 28, 1959, and within time allowed therefor by rule of Court, and valid extension thereof, for a rehearing of the above cause be, and hereby is denied.

[fol. 200] Clerk's Certificate to foregoing Transcript Omitted in Printing.

[fol. 201] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner, It is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 18, 1960.

Wm. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this 12th day of March, 1960.

[fol. 202] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR CERTIORARI—June 27, 1960

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to poceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 1036.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 27, 1960.

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189 IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

Honorable Peirson M. Hall, Judge Presiding

No. 26878 Crim.

UNITED STATES OF AMERICA, PLAINTIFF

v.

LEONARD SALDANA, DEFENDANT

REPORTER'S TRANSCRIPT OF PROCEEDINGS—August 7, 1958

Los Angeles, California

APPEARANCES:

For the Plaintiff: Laughlin E. Waters, United States Attorney; by Bruce A. Bevan, Assistant United States Attorney.

For the Defendant: Stephen Reinhardt.

190 The COURT. Call the calendar.

The CLERK. No. 26878-Criminal, U.S.A. versus Leonard Saldana.

(The following proceedings were had outside the presence and hearing of the jury:)

Mr. REINHARDT. Your Honor, before you bring the jury back, may I make a motion?

The COURT. Yes.

MOTION FOR DIRECTED VERDICT AND DENIAL THEREOF

Mr. REINHARDT. Your Honor, the defense would like to move for a directed verdict at the conclusion of the trial.

The COURT. The language of the statute is to move a judgment of acquittal on the ground of insufficiency of the evidence. Your motion is as to the remaining four counts?

Mr. REINHARDT. That is correct, your Honor, particularly as to Count V, where the evidence does not show there was a sale.

The COURT. Motion denied.

(The following proceedings were had within the presence of the jury:)

The COURT. United States versus Leonard Saldana. The record will show the defendant is present in person and by counsel, and the jury is present in each of his or her place. This is the time for argument.

191 Mr. Bevan?

Argument by Mr. BEVAN:

Mr. BEVAN. May it please the court, counsel, ladies and gentlemen of the jury, in my opening statement I told you that the Government expected to prove the facts contained in the indictment. I think by now you recognize the Government has so proved those facts—

The COURT. Excuse me, Mr. Bevan. I should instruct the jury that the case now pends as to Counts II, III, IV and V; and Count I, the conspiracy count, has been disposed of and will not be submitted to you.

Mr. BEVAN (continuing).—so, with the exception of Count I, the Government has proved to you, I believe, through testimony of its own witnesses and through admissions of the defendant, that the facts contained in Counts II, III, IV and V are true. The defendant has testified in effect, and I believe will raise the issue of entrapment upon his argument to you. I believe it proper for me to await that argument as to entrapment, and will do so, inasmuch as we have proved already those facts which are alleged in the indictment.

The COURT. Mr. Reinhardt:

Argument by Mr. REINHARDT:

Mr. REINHARDT. Thank you, your Honor. May it please the court, ladies and gentlemen of the jury: As the Government has told you, there is only one real issue left in this case. The defendant took the stand and frankly

192 admitted that the sales that were charged were made.

The only defense in this case, and the reason you will find, I hope, that the defendant is not guilty of the accusa-

tions, is that the defendant was entrapped into making these sales by the actions of Government agents.

Now, the court will give you instructions in the law of entrapment; when the court does so, I would like you to try to keep in mind the reasons that entrapment is a defense in a case of this kind. Entrapment may be a new concept to the members of the jury, it may seem strange that when a defendant has made sales of narcotics he is still not guilty under the law. But there is a reason for this. The reason that entrapment is a defense is that under the laws of the land we cannot permit Government agents to induce persons to commit crimes and then send them to jail for committing the very acts that are induced.

Now, Government agents serve a useful function; in order to trap criminals it is necessary that they secure evidence if someone is engaged in a course of criminal activity, there is nothing wrong with letting Government agents approach him and ask him if he will do what he has already been doing; this is just a way of securing evidence. On the other hand, we need protection for people who are not committing crimes, people whom the Government approaches and asks to commit a crime and causes to commit a crime. What type
193 of people does the entrapment doctrine strive to protect? Well, people who are well off, people who have swimming pools and Cadillacs don't need this protection. The Government is not likely to go to citizens successful in life and ask them to engage in narcotic traffic; those aren't the people the Government approaches, those aren't the people who need the protection. Those aren't the people the entrapment doctrine has been announced in order to protect. The people the entrapment doctrine protects are the economically underprivileged, the people who have social problems, the people who violated the law previously, the people who live in areas where crime flourishes, the people most likely to accede to pressure from the Government when asked to go out and enter into such an activity.

The issue is very simple; the defense hasn't asked many questions, the defense didn't examine each of the Government's witnesses because we never denied the defendant did make these sales. The only fact the defense attempted to

bring out in this case is what were the circumstances surrounding the first contact between the Government agent and the defendant; what was the defendant doing when the Government came to him; why did the Government come to him; what reasons did the Government give for asking the defendant to engage in the traffic of narcotics?

Now, the first question which I am sure will come to
194 your mind was: Was the defendant actually engaged in the traffic of narcotics at the time the two Government agents came to him? I should say rather than two Government agents, one agent of the Narcotic Bureau and one person who has been called a confidential informant, or secret informant. Do we have here a man who was then engaged in drug traffic, a man engaged in the course of criminal conduct, or do we have a man persuaded by the appeals of the Government to go out and become involved in this traffic? I think you will conclude the admissions of the Government agents show most of the elements are clearly entrapment.

Agent Jayme Licuanan is the first Government witness to testify; I think you will remember him; he is the man who sat next to counsel for the Government throughout this trial. Agent Licuanan testified when I asked him, that he approached the defendant with a letter from Julio Contreras who, evidence shows, to be a close friend and cousin of the defendant. Agent Licuanan brought this letter, and the defendant was informed his cousin was in jail, that bail had to be raised in order to get his cousin out of jail. The Government agents posed as dope addicts, not innocent people who might be harmed by the purchase of drugs, but people actively engaged in narcotics traffic and who could get drugs from any one of a number of people. These agents told the de-
195 fendant in order to get his cousin out of jail, in order that he be put back at liberty, they would have to raise some funds somehow, they had to sell dope, and they had to raise some money; and defendant told you he knew, and I am sure the Government knew, that it would be possible to get dope in this area from a number of people. Perhaps the defendant should have refused; I am sure you all think he should, but that is really not the issue in this case, whether

he should have refused. The defendant has already told you he regrets he didn't refuse, and I am sure you understand why he regrets he didn't refuse. But, the defendant was a man who lived in East Los Angeles, lived in an area where there were many people engaged in this traffic. He has told you he had been in prison before, he had been there for possession of marijuana. The possession of marijuana is a very less serious offense than traffic in heroin. He was not there first because he sold marijuana, he was there because he had it in his possession. When he was in jail he met numbers of people involved in the narcotics traffic. He knew the people, he knew the terms, it was easy for him to make a phone call and arrange for the sale of narcotics in order to help his cousin?

And what did the Government do when they approached this man? They came to a man who only had to lift the telephone to become a criminal in the eyes of the Government. They came to a man who lived in an area where the code is
196 not what it might be, where friends and relatives, perhaps, are engaged in this, but where the defendant had not previously been engaged, they took a man who can easily be pushed over into an area of criminal conduct, they appealed to his sympathy, his loyalty, they appealed to the best emotions defendant had, they appealed to the code of the people who live in that area, the code that you should help your cousins, your relatives, your friends. All he had to do was lift the telephone.

Without great thought, and without great intelligence, the defendant acceded to the request of the Government.

Now, what was the defendant's role in this? At no time has it been shown that the defendant had dope available in his house when the Government requested it. What the defendant would do is call a supplier; there were lots of suppliers in the area. The defendant would call one and have dope sent over. He was a go-between and an agent who was a go-between at the request of the Government. There was no extensive planning required in this case, there were no difficult arrangements to make, a number of people who lived in the area could have done the same thing the defendant did. For-

tunately, not all would have, but some of them would have if the Government had come to them and made an appeal of this nature.

Everyone has agreed, on the witnesses' testimony, who
197 supplied the dope. The dope was supplied by a man named Albert Palomino, but we are not here to judge Albert Palomino, he is not on trial before this jury. But defendant Saldana did, and all Saldana did was to make a telephone call on several occasions when the Government asked him to get dope in order to raise money for his cousin, in order to help his lifelong friend.

The clear question the jury will have to decide is what the defendant's course of activity was prior to the time the agent approached him.

As the Government told you, he was convicted of possessing marijuana in 1947, eleven years ago. I don't know how many people in the area in which the defendant lives have had possession of marijuana at some time. In any event, that was eleven years ago. Also, as the Government has brought out, the defendant was once convicted of taking an automobile unlawfully. As the court will instruct you, this is not to be considered as any evidence that he committed the present crime.

Now, what testimony is there concerning the defendant's activity prior to the time he was approached and persuaded by the Government agents to launch into a course of criminal conduct? What is the Government's testimony in this regard? You will remember Agent Licuanan first testified he approached
the defendant Saldana in order to obtain an introduction
198 to one Pancho. The defendant told the Government agent he couldn't take anyone to Pancho, he didn't know Pancho well enough, it would be difficult to take someone to Pancho, he hadn't had any dealings with Pancho. This was the end of Pancho's connection with this case. But if the agent knew or thought that the defendant was involved in the drug traffic why did he go to him and ask merely to be introduced to Pancho? If the Government had thought or had any idea that the defendant Saldana was engaged in the traffic of drugs,

wouldn't he have gone to him and attempted to buy drugs from him? Yes, the Government's agents specifically deny they went to Saldana with an idea of asking him to get them drugs. The Government agent says it was just voluntary, we didn't even want him to sell us drugs but he was eager to sell us drugs.

There is a basic inconsistency in the Government's position. They try to establish on one hand they knew defendant was engaged in drug traffic and in the next breath they tell us they were surprised that the defendant offered to supply them with drugs, they had no intention of obtaining drugs from him. Why did the Government's witness testify in this contradictory manner? Well, the first story you were told by Agent Licuanan was the one I have just related. First he said they went to the defendant just in order to meet Pancho.

199 At that point in my cross examination of the agent it became apparent that the defense was attempting to prove, and had made a good case of entrapment. Then I asked the agent, in order to clinch the case, to show that the Government had no reason to approach Saldana and had no idea he was engaged in drug traffic, because he wasn't engaged in drug traffic, I asked him if he had any idea or evidence the defendant was engaged in drug traffic. Well, the agent hesitated, and finally remembered dimly, yes, he had a conversation somewhere, somebody told him the defendant was engaged in drug traffic. Who and where? Well, at first he didn't remember. This was the first time the agent had any difficulty remembering anything, as a matter of fact, his memory got better as the trial went on, he remembered far more on the second day than on the first. He remembered far more after my cross examination than he had when he first testified. You remember, the first day of his testimony he remembered several conversations word for word, he had no trouble remembering, but it was only on the second day after the entrapment defense became an issue, he suddenly remembered on the first day he had met Saldana, Saldana had said to him: Oh, I sold a huge amount of heroin, I sold 20 ounces the day before.

That is a fairly significant point in this case. If it is true he sold 20 ounces the day before, of course, there is no
200 entrapment. That is the point the Government would have made on the first day if it had been true, but that is a point only brought out after we went into the entrapment defense. The agent suddenly remembered it all clearly, what Saldana had told him and had done. That is a trained witness; he has been in the business for years, his memory was excellent, the first day; the time the witness' memory began to fail was when I asked him: What information did you have that Saldana engaged in narcotics traffic? At that point his whole line of attack shifted; he suddenly abandoned the idea he had gone to a man he had no information about with a letter, his going to Saldana with a letter, that line was abandoned. Suddenly, he had gone to Saldana, there was a major dope peddler named Leonard who lived around that neighborhood. That was a good story. After he had hesitated for a while he came forth with it. To return to that conversation in more detail, I asked him where he heard this. He didn't know, for a moment, where. I asked him where he heard this. He didn't know from whom or where. I asked him the question several times, then he remembered. Yes, he had heard it over coffee somewhere; from whom? Oh, a deputy sheriff. Did he know who the deputy sheriff is? No, maybe two or three deputy sheriffs. No, he didn't remember. Then I said: Do you mean to tell me you knew this man was a big dope peddler, you had that information and didn't remember
201 who told you? Yes, he did remember now, he knew it was Deputy Sheriff Peterson, sitting right there, the man he was looking at while he testified, the first man who came to his attention. Then he remembered the man, that is who it was.

Agent Licuanan made the best case he could after I shifted the line of attack, he found someone who might be willing to confirm his story; the man was right there and heard him give the story.

I just don't understand why it is possible for the witness to testify that he went to Leonard Saldana merely in order to get an introduction to Pancho, and then in the next breath

to say that Leonard—he said he had information that Leonard was a big dope peddler. Well, he remembered a lot more at that time. He also remembered Leonard had a conviction for a narcotic deal. How many? First he thought it was two or three, finally it turned out to be eleven years ago, conviction for possession of marijuana. He said he knew about these convictions when he went out to Leonard. Of course, as you know, he had every opportunity to learn about that conviction prior to the time of his testimony. This was, again, something he dragged out in a last attempt to show that the Government had some reason to entrap this defendant.

I submit to you that Agent Licuanan's testimony from the time I asked him what information he had as to Saldana's activities is pure fabrication. The agent had made a case, he got all the way to the trial, he was halfway through his testimony, he discovered the defense, he realized that the Government was wrong in going to the defendant, preying on his sympathies, picking out an easy mark and then shoving him over into the area of criminal activities, that the Government shouldn't go around to people like Saldana who had trouble before and try to make criminals of them. The duty of the Government is to try to assist these people, to try to help them go straight, and not to try to convict people because they have had trouble before.

202

Other than Licuanan's statement as to the statement made by Peterson, there is no evidence that Saldana was engaged in criminal activities selling dope when the agent approached him. If he was engaged in selling drugs to other people, the Government had the opportunity to discover that, they could have placed the defendant under surveillance. Whether they did that, I don't now, and you will never know. But if they did, they didn't know he was selling drugs to anyone else, they had no information he was selling drugs before April 28th, because the only evidence in this case is that this defendant sold drugs to a Government agent to help his cousin after the Government agent told him that was how to get his cousin out of jail.

Regardless of whether it was right for him to sell
203 those drugs, and he wasn't, he is not guilty under the law if you conclude that he did sell because he was persuaded to do so by the activities of the Government agent.

Do we have any other evidence of this alleged conversation with Peterson? Well, the Government called Sheriff Peterson to the stand. They said to Sheriff Peterson: Did you have any conversation with Agent Licuanan on April 28th? Peterson, who had been sitting there when Licuanan said there was such a conversation said yes, I had a conversation. Well, we don't know what that conversation was, we don't know from Peterson that he ever did tell Licuanan anything about Saldana. I didn't ask him. He had heard Licuanan's story, he had seen it made up on the witness stand. I didn't want Peterson to confirm it when he had sat there and heard it; but Peterson never said he had told Licuanan that the defendant was engaged in narcotics, or that there was any Leonard who was a big narcotics peddler, or that anyone living in or around this area was a big narcotics peddler, and this is the Government's main point. They have to show that the defendant was ready and willing to engage in this traffic; they have to show some evidence that he was not persuaded by the Government to do something he would not otherwise have done. The only way they can do that is to show he was doing something before.

The only evidence as to that is that fabrication, or the
204 story that was told by Agent Licuanan after he was pressed to the wall. That is not even confirmed by Peterson, although he is the one alleged to have told it to him.

It is true there is one other witness in this case, Roy Singh, a confidential or secret agent. Roy Singh says he was a narcotics addict, that he cured the habit a couple of months ago, he didn't remember when, but he was sure it was prior to the time when he approached Saldana in company with the Government agent. Now, Mr. Singh stated he had previously been convicted of a narcotics violation, and that he continued to use narcotics. Suddenly we find him in the company of the Government; he worked for the Government, he acted as their agent. But I have to call him as a witness for the defense. Why did I call him? He was the only other person to the

conversation at the time the entrapment took place. Now, of the three witnesses, Agent Licuanafi, the defendant and Roy Singh, the Government did not produce Roy Singh. I had not much expectation when I called him that he would be willing to testify for us. As he told you, he has been taking drugs, as he told you, he had convicted for violating the law, and is now acting for the Government. He hasn't been prosecuted for that violation. It would be unreasonable for me to expect Roy Singh to tell the truth, to substantiate the defendant's story as to what really happened when the
205 Government entraps them, because if Roy Singh told what happened he would not be in very good shape right now. I think you can readily understand why Roy Singh refused to substantiate the facts in this case, but we presented him so you could see the testimony of the three people who were there when this entrapment took place.

There is one further point I would like to make at this time. There were four counts and you will consider four sales of narcotics, and all these sales took place after the Government entrapped the defendant. The only real issue is whether the defendant was originally set on this course of conduct by the activity of the Government. If he was so set on this course of conduct, and if they came back to him under the same relationship, then I think you would be justified in finding, and you should find, that this is one continuous entrapment. This is not a case where the Government comes to a man and traps him into committing an offense, then he goes out and murders somebody, or sells drugs to people and in general becomes a professional narcotics peddler. This is a case where the defendant on four occasions sold to the same man, the same Government agent who had persuaded him that he should make these sales in order to help his cousin. The same defense of entrapment applies to all four counts. If you find he was entrapped on the first count, then, logically, it fol-
206 lows he did these acts for the same reason the next three times, these were the same parties, the same circumstances.

Now, there is really just one issue in this case, either we have here a man who is engaged in narcotics traffic and

the Government knew it and they went out and they provided the opportunity for him to make additional sales, and they did this, if they did it, quite justifiably in order to get evidence against him of engaging in narcotics traffic, if that is your belief, then it is clear the Government's case is established and defendant is guilty. But if you have any reasonable doubt as to this, if you have any doubt as to whether the defendant was innocent or not at the time the Government approached him, if you have a reasonable doubt in light of the story of the Government's witness, in light of his first story that he originally went to him just in order to get an introduction, and then his subsequent change to the fact he knew Leonard was a big dope peddler, if that raises any doubt in your mind as to what defendant's course of conduct was when the Government approached him, if you have that reasonable doubt, then under the law the judge will instruct you to return a verdict of not guilty on the basis of the defense of entrapment. If you have any reasonable doubt as to whether defendant was entrapped in that incident you must return a verdict of not guilty.

207 Now, the defendant took the stand voluntarily, he told you a fairly honest story, it seemed to me he couldn't have been more honest with you; he told you his background, he didn't try to hide conditions under which he exists, his friends and associates; he told you how familiar he was with the narcotics traffic; he didn't paint a rosy picture of himself. He told you he made friends among convicts when he was in prison. I think, understandably, the defendant didn't have available to him the right range of friends or people from whom to select friends. It is understandable, living in the area where the defendant lives, having been brought up under social and economic conditions such as the defendant was brought up under, it is natural, living in this area, knowing these people, he would be familiar with narcotics traffic. He told you all this and he told you that is what made him an easy prey for the Government agent who wanted to get a conviction. I think you must conclude the defendant told you the truth when he took the stand, that he told you why he did this, that he told you he acceded to

the Government's request, that he told you it was easy for him to get the drug people to trust him, that he told you he had a code different from yours and mine, he had a code that wouldn't rat on his friends, wouldn't act as a Government agent and turn over people he was associated with, wouldn't insinuate himself into the lives of people and pre-
208 tend to be a personal friend, then turn them over to the Government.

Whether that is right or wrong, that is his code, part of his code, to help his friends, to help his relatives, to help people who haven't been brought up under the same circumstances as you have, people who have been brought up in this area and were involved in narcotics traffic. Well, you help them in some ways and it is right, and you help them in other ways and it is wrong. You certainly help them by raising bail for them by legal means, or you help them by raising bail through selling drugs. Defendant knew it was wrong but he did it because the Government came to him, and persuaded him, and that is the only point in this case, the reason the defendant did these acts.

I hope you will bear all this in mind when the court gives you instructions on entrapment. This is the defense. The question is: What was the defendant's state of mind? Do you believe all the evidence of Agent Licuanan? Do you believe he really told the truth when he told you that story about the unidentified people over a cup of coffee, when he couldn't remember who they were, when "they" finally were reduced to just one person, and when that person finally turned out to be a gentleman who works for the Government sitting in the front row of this court. When you consider all of the evidence I hope you will conclude that
209 at the very least there is a reasonable doubt in your mind, that the defendant was entrapped under the evidence as you have heard it. You would be justified in concluding that there is no doubt that the defendant was entrapped, but that is not necessary. All you need is a reasonable doubt.

The evidence is before you. I am sure you will give it your fair consideration and return a verdict of not guilty to all counts. Thank you.

The Court. Mr. Bevan.

Mr. Bevan. May it please the court, counsel, ladies and gentlemen of the jury: I think it is a fair statement to say that the major point of the defense here is that the Agent Licuanan was inconsistent when he told you he went to Mr. Saldana for the purpose of obtaining an introduction to Mr. Pancho. And, on the other hand, when he said to you in cross examination that he had had information from someone later identified to be a deputy sheriff, that a man named Leonard was a major dope peddler in the East Los Angeles area, and he had had prior convictions for narcotics dealings, it is contended that is inconsistent. I would agree to that. It is further contended that the inconsistency is by reason of the fact that the agent added to his testimony, let us say, likewise, when he said he had had information that there was a major dope peddler in East Los Angeles by the name of Leonard, whom he thought
210 Saldana was. I don't know what was in the mind of the agent. Let us assume that he lied to you; let us assume that he puffed his case when he thought the defense of entrapment was coming forth to you. Look at the evidence, then, that remains, and ask yourself what difference does that puff make? What remains? So the Government did not have evidence before they went to Saldana that he was a member of a dope gang. Then what facts remain? I think those facts are, then, almost uncontested, they are agreed to by the defense and by the Government, Mr. Licuanan has stated, and I think the Government records will bear him out, or they would have objected to their introduction as inconsistent with the testimony in this trial, that he went to Mr. Saldana, had given him Government's Exhibit 5; it says:

> Ese Renard,
>
> this is Julio your Primo. I'm here in the county and I'm sending you my Brother in law Roy he is already going out, and he is going to help me with some bread so I can make it, he'll explain. tu Primo
>
> Julio
>
> Primo if you dont believe Roy, send someone to see me on visiting hours.

Licuanan testified, and the defendant also testified that Licuanan asked him for an introduction to a man by the
211 name of Pancho so that Licuanan could make some purchases of narcotics from him. This Mr. Saldana admits. Mr. Licuanan testified also that Mr. Saldana said: I don't want to introduce you to Mr. Pancho; or: I cannot introduce you. This, also, Saldana admits.

I would like you to examine the inconsistency not only with the Government's position, we have done that, but that of the defense. The defense has stated the Government has come here—went to Mr. Saldana to corruptly change his mind from that of an innocent person, to make him commit one of the most heinous crimes that can be committed, selling narcotics. On the other hand, they admit the agent went there merely for the purpose of obtaining an introduction to another known dope peddler. Don't you think there is a little bit of inconsistency of the defense in that regard, if the only reason the agent had for going there is to obtain an introduction from Mr. Saldana to another dope peddler? Can it be said fairly, then, the whole Government purpose in going to Mr. Saldana was to corruptly make him a dope peddler? That doesn't make sense, since Mr. Saldana and Licuanan and he agreed he asked him to make an introduction to Pancho to help him buy narcotics. I think you will agree the purpose in going was not to obtain narcotics from Mr. Saldana. That makes sense and is consistent. I think that, then, is established; and
212 then we come to what happened after Mr. Saldana stated he was unable or unwilling to make an introduction to Pancho. Now, Licuanan testified, as to the testimony of Saldana, saying that Saldana said: Why go to Pancho, I know Pancho's source of supply is Kitty. When I asked Mr. Saldana why he refused to make an introduction to Mr. Pancho of the agent, he said, and I think it is a rather unsatisfactory answer, he said that, "Well, I was afraid. He is a pretty tough boy, Pancho, and I was afraid we could get hurt." Hurt in what respect? If Pancho is in the business of selling narcotics, he will go through with a sale, he is not going to hurt somebody, because sales must be made to make

money. He will hurt him only if Mr. Saldana is there to be a squealer or a rat; he will hurt those two people in that instance. But, as everyone knows, Mr. Saldana, according to his code, would not be a squealer; his entire community knows that, and he himself testified to that, so that could not be the reason Mr. Pancho would hurt him. There is no other reason advanced why Mr. Pancho would hurt him, so why, indeed, did Mr. Saldana refuse to make that introduction?

I think you can find fairly from this evidence that he refused to make an introduction because he didn't want Licuanan dealing with Pancho, he wanted Licuanan dealing with himself. I think it is further borne out. Suppose he was unable to make the introduction to Pancho, absolutely unable to do so. He knew ten people in the immediate area to whom he could have made an introduction, from whom Licuanan could have bought narcotics; but did he do so? No, too easy. He goes to Santa Ana and has Mr. Palomino, a dope peddler, arrange this. If Mr. Saldana was not in the narcotics business, didn't want to have anything to do with narcotics, what would he do when a person came to him and wanted to buy narcotics? If he wanted to help this fellow Julio out for any reason, and yet stay away from the criminal aspects of selling narcotics, he would do one thing: Arrange an introduction to a person in that immediate neighborhood, perhaps next door, and get out of it and stay away from him. But what did he do instead of that very simple thing that could have occurred in his immediate neighborhood? He arranged to be a middleman for a dope dealer in Santa Ana, and why? Because he says the dope dealer in Santa Ana had promised to give him a break.

213

There was another comment upon Mr. Licuanan's statement in cross examination on the second day, that Licuanan stated the first time he met Saldana, Saldana says: "Why go to Pancho, I know a source of supply. I sold 20 ounces just the day before." The statement of Licuanan that Saldana said he had sold 20 ounces the day before is attacked as a fabrication, something the agent made up on the second day;

you have noted the agent's reports were given to the
214 defense and you have seen that certain items, such as the one that Leonard was a major dope peddler was not included in those reports. That was brought out by very learned counsel——

Mr. REINHARDT. Your Honor, I am going to object, there was nothing brought out on the basis of those reports.

The COURT. You asked him whether or not he had information before he went out there that Leonard was a peddler, if it was in his reports. That is what he is commenting on.

Mr. BEVAN. May I proceed, your Honor?

The COURT. Proceed.

Mr. BEVAN. Thank you, your Honor?

That comment was brought out by counsel when he did not find it in the report, but you will note he never made any comment on cross examination that the statement "I sold 20 ounces the day before" was not in those reports, that was not brought out, and I think it fair for you to infer from that that that statement was in the reports, and, therefore, since that statement was in the reports a long, long time before this defense of entrapment arose, I think it fair to infer that statement did take place. If that statement did take place obviously the Government is not corruptly having this man become a narcotics peddler, when he sold 20 ounces of dope the day before.

I think even the defense agrees if Mr. Saldana actually sold
narcotics previous to the Government's contacting him,
215 then there is no entrapment and he is stuck with his admission of the facts in this case. Now, we do have that inconsistency; Mr. Saldana denied he made a statement he sold 20 ounces of narcotics the day before. We need not believe that, you need not believe that; one reason is because he has two prior felony convictions; another is because of the circumstances. He has a lot to gain and a lot to lose in this case. Another thing, strictly aside from fabrication of testimony is on memory. He obviously didn't take notes of these things; the agent did. I think you can find from one little circumstance in the case that Saldana's memory is not too good, is not beautifully accurate, at any rate, because you

will remember even after Mr. Singh took the stand and testified he used the name Roy when introduced, nevertheless, Mr. Saldana took the stand and said: I just met that man who left the stand, his name was George. It wasn't Roy. But in Exhibit 5, it states: "I'm sending you my brother in law Roy * * * if you don't believe Roy * * *" So, obviously, the man was introduced as Roy, and at least Mr. Saldana's testimony he was introduced to him as George is shaky, his memory is at least a little gone in that respect.

Aside from the agent, I think you can find from less evidence, ladies and gentlemen of the jury, that the defendants own story is incredible, just by looking at it on its own hook. His own statements, I think, will show he was engaged
216 in sales of narcotics before. Let us take a look. The most important thing I think is the fact that these are four sales, this is not a single, isolated instance of one person who was a man who comes to him and pleads with him, begs with him to obtain narcotics. I can see a situation where, perhaps, entrapment might occur on one such occasion. I can even stretch my imagination to believe a man could be corruptly influenced to sell narcotics against his own, innocent will on two occasions, but on the third and fourth, particularly, with the fourth, which involves a sale of 10 or 11 ounces of heroin, 437 grains being in an ounce, and a grain or so being the normal equivalent, I should think, of addicts' use, that is an awful lot; it is more than 400 different shots to addicts right there. I should think that four sales alone are more than enough to throw a shadow of doubt across the defendant's story. But then we have, also, his association with peddlers, his cousin Julio in jail, Pancho he admits to be a known narcotics peddler, Palomino he obviously knew to be a narcotics peddler, Licuanan and Mr. Singh came up and introduced themselves as narcotic peddlers. And consider, also, this: The ease with which he bought narcotics from Mr. Palomino, who trusts him with a very valuable thing, 10 ounces of narcotics, and trusts him to get the money back on those other occasions.

Do you think it is likely for a person being engaged in
217 such a dangerous business as narcotics to trust for the first time Mr. Saldana, who is never known to sell nar-

cotics before, to come to you and say: "I want to buy 10 ounces of the stuff"? Would that person say, "All right Leonard, you are a good guy, I know you to be no informer." If Leonard Saldana is known in his neighborhood not to be a dope peddler, then when he does go to someone to buy dope it looks suspicious to the dope peddler. But it did not look suspicious to Palomino, he just took it for granted. You think about that. So unless Mr. Leonard Saldana was in the dope business previously, Palomino's suspicions would have been aroused by the fact he was coming to him for the first time.

Again, Saldana, instead of merely introducing Mr. Singh and Mr. Lieuanan to somebody else in his neighborhood and getting rid of the narcotics aspect there, acts as a middleman actively engaged in the business of buying and selling, he says without profit. I think the testimony is important, also, that the defendant has been stated, and it has been argued here, that he has been very frank with you as to his associations here. That is true. It is easy to prove his associations, it is easy to prove the actual fact of sales. It is not easy to prove his intent. But one thing he wasn't frank about, he has told you he was not in narcotics peddling for profit, but he didn't tell you what his business or occupation was; he didn't say what he did to get the money that he lived on. So take a look, then. If he didn't have an occupation perhaps, if he didn't mind associating with narcotic peddlers, if he sees all his friends making money selling narcotics, and if he, evidently, doesn't have any moral scruples against buying and selling narcotics, then why would he not sell narcotics for profit? What does he have against it? Is he frank? He wasn't afraid to buy and sell narcotics with no profit in it, according to his testimony. I think it is plainly obvious that there would have been nothing in his mind against making profits from dope sales, and, in fact, there was nothing in his mind. It would be interesting for me to know whether a single member of the jury would think he had any scruples against committing a crime for a profit, any scruples against selling dope.

218

Well, I think that summarizes the reasons that I think you can find why you should disbelieve him when he says he never before sold narcotics for a profit. Let us say you believe

everything that this man tells you, this twice-convicted felon, and that everything happened exactly in the way Mr. Saldana says it happened. Then I still think you cannot find it to have been entrapment. Entrapment is going to be defined for you by the court, and I believe it will primarily consist of the fact the Government's agents are not the ones that induced this thought into the defendant's mind, and persuaded him
219 from an otherwise innocent course to a course of conduct he admits having engaged in. For instance, supposing a narcotics agent comes to another and asks him, "George, I have got to have narcotics for my wife, she is going through withdrawal, needs a few grains of heroin," and the other says, "No, I will have nothing to do with it." The agents says, "You have got to do it, my wife is just screaming." So the other gets him some heroin. Would you convict a man after he went and got a few grains of heroin for that purpose? You would have thought when the agent did obtain narcotics and thereafter arrested that man it was not so unlawful for that person in that instance, and under those circumstances, to go ahead and buy and sell narcotics.

Let us take the situation here: Mr. Saldana is approached by two persons identified to be dope peddlers who want to buy dope; they say one of the reasons for doing so is a portion of their profits is going to get another dope peddler, his cousin, out of jail. Are you going to send this man back to his neighborhood and have him tell other people: I was acquitted, I merely told them these fellows came up to me, and I told him I sold dope to raise money to get another dope peddler out of jail. Is it lawful for a person to sell the dope to a dope peddler so that their profits from the sale can get another dope peddler out on the streets again? Is that what you are going to
220 determine to be lawful? Because, if you acquit the defendant, that is going to be your determination, and it will create a lot of amusement in this person's neighborhood.

Again, I want to tell you to look at the facts rather than the argument of counsel, of myself or defense counsel. Defense counsel repeatedly stated to you the Government induced this fellow to sell narcotics, the Government did this and that to

corrupt this poor innocent. Look at the facts instead, and see what they did. Everyone, including his client, admits that the sole purpose of going to Mr. Saldana was to arrange an introduction to another man; Saldana refused to make that introduction, instead acted as a middleman; so, was the Government's agent's idea at the time he goes there to corrupt this man? Obviously not, but that is what was argued to you. It was not a fact and Mr. Saldana says it was not a fact. I think you will find even Mr. Saldana testified to no repeated solicitations of him to commit this crime; even if you believe his testimony he was the push-over—"Oh, I was afraid, I thought about it and made a choice," there is hardly persuasion by Government agents to find he was engaged in selling dope.

If I may summarize: I merely want you to do your sworn duty you said you would do in judging the evidence here. If you have some reasonable doubt as to the defendant's innocence, I think you should do your duty and acquit him.

221 On the other hand, if you believe it is unlawful for a person to sell dope so that another dope peddler can get free from jail, then I should think you should so vote and find the defendant, accordingly, guilty. In any event, I hope after your determination here today the verdict that you have arrived at will be one that you will not be ashamed of in the years to come.

COURT'S INSTRUCTIONS

The COURT. Ladies and gentlemen, it is now my duty to instruct you in the law applicable to this case and it is your duty to follow the law as I give it to you. On the other hand, you are the sole judges of the facts. By the finding of the indictment in this case no presumption whatsoever arises to indicate that the defendant is guilty or that he had any connection with or responsibility for the acts charged. A defendant is presumed to be innocent at all stages of the proceeding until the evidence introduced on behalf of the Government shows him to be guilty beyond a reasonable doubt. And this rule applies to every material element in the offense and there are several material elements to the offense as charged here. A

mere suspicion will not authorize a conviction. A reasonable doubt is such a doubt as you may have in your own mind when after fairly and impartially considering all the evidence you do not feel satisfied to a moral certainty of the defendant's guilt.

In order that the evidence submitted shall afford
222 proof beyond a reasonable doubt, it must be such as you would act upon in most important and vital matters concerning your own affairs.

A reasonable doubt is not a mere possible or imaginary doubt or bare conjecture, because it is difficult to prove anything to an absolute certainty. You are to consider the strong probabilities of the case and a conviction is justified only when such probabilities exclude all reasonable doubt, as the same has been defined to you and without it being restated or repeated to you again. You are to understand that the requirements that the defendant's guilt be shown beyond a reasonable doubt is to be considered in connection with and as accompanying each and every one of the other instructions.

In judging the evidence you are to give it reasonable and a fair construction, and you are not authorized because of any feeling of sympathy or bias to apply a strange construction, that is one that is unreasonable in order to justify a certain verdict, when were it not for such feeling or bias you would reach a contrary conclusion.

Whenever, after a careful consideration of all the evidence your minds are in that state where a conclusion of innocence is indicated equally with a conclusion of guilt, or there is reasonable doubt as to whether or not the evidence is so
223 balanced, then you must adopt the conclusion of innocence.

You are the sole judges of the credibility and the weight which is to be given to the evidence which has been produced and the testimony given by the witnesses in this case. Every witness is presumed to speak the truth, but this presumption, however, may be repelled by the manner in which the witness testifies, the character of his testimony, or by evidence affecting his character for truth, honesty and integrity, or by his motives, or by contradictory evidence, or evidence of a previous conviction of a felony.

Now, evidence of a defendant's previous conviction of a felony is to be considered by you only insofar as it affects the credibility of the witness and must not be considered as evidence of guilt of the offense which is charged against the defendant in this case.

In judging the credibility of the witnesses in this case you may believe the whole or any part of the evidence of any witness and you may disbelieve the whole or any part of it, as may be dictated to you in your judgment as reasonable men and women.

You should carefully scrutinize the testimony given, and in so doing, consider all the circumstances under which any witness is testifying, his demeanor, the manner while on the stand, intelligence, relation to the Government, or the
224 defendant, the manner in which he or she might be affected by the verdict and the extent of contradiction or corroboration or by other evidence, if any, in any matter that tends reasonably in the light of your own experience as reasonable men and women to shed light upon the credibility and the truth of the testimony of each witness.

The defendant has offered himself as a witness and has testified in this case and having done so you are to estimate and determine his credibility in the same way as you would consider the testimony of any other witness.

An indictment is but a formal method of accusing a defendant of a crime and it is not evidence of any kind against the accused and does not create any presumption or permit any inference of guilt.

There are two types of evidence from which a jury may properly find a defendant guilty of an offense. One is direct evidence, such as the testimony of an eye witness, and the other is circumstantial evidence. The proof of a chain of circumstances pointing to the commission of an offense or the existence of a fact. As a general rule, the law makes no difference between direct and circumstantial evidence, but simply requires that before convicting a defendant the jury must be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case. You are not limited

in your consideration of the evidence to the bald expres-
225 sions of the witnesses of other direct testimony, but you are authorized to draw such inferences from the facts and circumstances which you find have been proved as seem justified in the light of your own experience as reasonable men and women.

An inference is a deduction or conclusion which reason and common sense leads the jury to draw from facts which have been proved. A presumption is an inference which the law requires the jury to make from particular facts in the absence of convincing evidence to the contrary. Unless and until outweighed by evidence to the contrary or by other presumptions the law presumes that a person is innocent of a crime or wrong, that a witness speaks the truth, that official duty has been regularly performed, that private transactions have been fair and regular, that the ordinary course of business has been followed, that things have happened according to the ordinary course of nature, and the ordinary habits of life, and that the law has been obeyed. These presumptions continue in effect until overcome and outweighed by evidence to the contrary, and a presumption may also be overcome by other presumption or by an inference; but unless outweighed, the jury are bound to find in accordance with a presumption.

In every crime there must exist a union or joint operation of act and intent. The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt.

226 The indictment in this case, or rather, the section of the code under which this indictment is brought, Section 124 of Title 21 of the United States Code, which in its applicable part provides as follows:

> Whoever fraudulently or knowingly sells or in any manner facilitates the sale of any narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law shall be guilty of an offense.

The law prescribes a penalty with which you are not to be concerned, because in the event you find the defendant guilty

the responsibility for imposition of punishment rests solely upon the shoulders of the judge.

The indictment here is in four counts as it stands now, Counts II, III, IV and V.

Count II charges that on or about April 28th in this County, District and Division the defendants Albert Arroyo Palomino and Leonard Saldana knowingly and unlawfully sold and facilitated the sale to Jayme Licuanan of 1 ounce, 423 grains of heroin, a narcotic drug, which as defendants then and there well knew had been imported into the United States contrary to law.

Count III charges on or about May 7, 1958, in this County,
District and Division, the same two persons knowingly
227 and unlawfully sold and facilitated the sale to Jayme
Licuanan, 1 ounce, 32 grains of heroin, a narcotic drug, which as the defendants then and there well knew had been imported into the United States contrary to law.

The third one, which is Count IV, charges that on or about May 13th, in this District and Division, the same two persons knowingly and unlawfully sold and facilitated the sale to Jayme Licuanan of 1 ounce, 7 grains of heroin, a narcotic drug, which as the defendants then and there well knew had been imported into the United States contrary to law.

And the last one charges that on or about May 21st in this County, District and Division, the defendants Albert Palomino and Leonard Saldana knowingly and unlawfully sold and facilitated the sale to Jayme Licuanan and Victor Segura of 10 ounces, 339 grains of heroin, a narcotic drug, which as the defendants then and there well knew had been imported into the United States contrary to law.

As I previously advised you at the outset of the trial, the indictment was read to you and it contained Count I, which is the conspiracy count. That count has been disposed of other than by a verdict of the jury, and it will not be before you and it will not be necessary for you to consider it. There remain these four counts in that two persons, this defendant
and another person is charged in each count. You are
228 to give no consideration as to whether or not the other person is or is not guilty because he is not on trial before

you and the only person on trial before you is the defendant Saldana, and your only determination is to determine whether or not he, himself, was guilty, and he may be found guilty regardless of the guilt or innocence of the other person.

Now, there are several elements to each one of these offenses. As I indicated before, each of them must be proved beyond a reasonable doubt and to a moral certainty. They are, No. 1, the substance must be a narcotic drug. As to this element, Section 171-A of Title 21, United States Code provides in part:

> That the words "narcotic drugs" mean opium or any compound derivative or preparation of opium.

You may take judicial notice that heroin is a derivative of morphine, morphine is a derivative of opium, heroin is, therefore, a narcotic drug under the law.

The second, the defendant must, in fact, have sold or facilitated the sale of the heroin as charged in Counts II, III, IV and V of the indictment. The third, all of the acts done by the defendant, if you find they were done, must be so proven to have been done knowingly.

Now, the purpose of using the word "knowingly" is to make sure no one will be convicted of an act done because of mistake or inadvertence, or other innocent reasons.

229 And, fourth, the narcotic drug must have been imported or brought into the United States contrary to law, and the defendant must know it.

As to this element, Section 174 of Title 21 of the United States Code provides in its material part that:

> Whenever on trial for a violation of this statute the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

The statute just read does not change the fundamental rule that the defendant is presumed innocent until proven guilty beyond a reasonable doubt, nor does it impose upon the defendant the burden of producing proof that the narcotic drug

was lawfully imported or brought in, or any other evidence at all, for that matter.

As previously stated, the burden is always upon the prosecution to prove guilt and all the elements of it beyond a reasonable doubt. What this statute does do is to create an inference in favor of the United States. If you, the jury, should find from the evidence beyond reasonable doubt and to a moral certainty, that there was possession, as that term will be defined to you, on the part of the defendant as to each respective count in which he is charged, such
230 possession permits, but does not compel you to draw the inference that the narcotic drug was imported or brought into the United States contrary to law, and that the defendant knew it. Whether to draw that inference or the contrary inference that the narcotic drug was not imported must be decided as a question of fact from a consideration of the whole evidence.

In connection with any explanation the defendant may choose to offer for his possession of a narcotic drug, you are reminded that in the exercise of constitutional right, the accused may not testify. He did testify in this case, but possession may be explained through his testimony or through other circumstances and other evidence independent of the testimony of the accused. In order for the Government to get the benefit of the presumption above named, it is necessary for them to prove that the defendant, on or about the dates of each of the alleged sales, had possession of the narcotic drug in question.

In that connection, the law recognizes two kinds of possession, actual possession and constructive possession. A person who knowingly has direct physical control over a thing at a given time has then an actual possession; but a person who, although not in actual possession, knowingly has the power at a given time to exercise dominion or control over a thing is then in constructive possession of it.

231 The law also recognizes that the possession may be sole or joint. If one person alone has actual possession or constructive possession of a thing, possession then is

sole. If two or more persons share actual or constructive possession of it, possession is joint.

If you find from the evidence beyond a reasonable doubt that the accused either alone or jointly with others had actual or constructive possession of the narcotic as described in the indictment, then you may find that such narcotic drug was in the possession of the accused within the meaning of the word "possession" as used in these instructions.

There is the additional element; the defendant must have intended to do that which he in fact did do. Specific intent with respect to the charge included here must be proved beyond a reasonable doubt. Specific intent, as the term suggests, requires more than a mere general intent to engage in certain conduct. A person who knowingly does an act which the law forbids or knowingly fails to do an act which the law requires, intending with evil motive or bad purpose to either disobey or disregard the law, may be found to act with specific intent. An act or failure to act is done knowingly if done voluntarily and purposely and not because of a mistake or inadvertence or other innocent reason.

Intent may be proved by circumstantial evidence, and while witnesses may see and hear and thus be able to give
232 direct evidence of what a defendant does, or a person does or fails to do, there can be no eye witness account of the state of mind with which the acts are done or committed, and it can rarely be established by any other means than circumstantial evidence.

In this case the defendant has raised the question of entrapment. In that connection, you are instructed that the accused here offers the defense of unlawful entrapment as to each crime charged in the indictment, as to each of the counts. The law recognizes two kinds of entrapment, unlawful entrapment and lawful entrapment. When a person has had no previous intent or purpose to violate the law but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law as a matter of policy forbids conviction in such a case. On the other hand, where a person already has the willingness and readiness

to break the law the mere fact that the Government agent provides what appears to be a favorable opportunity to break the law is no defense, but it is lawful entrapment.

When, for instance, the Government has reasonable grounds for believing a person is engaged in illicit sale of narcotics, it is not unlawful entrapment for a Government agent to pretend to be someone else and to offer either directly or through
233 an informer or other decoy to purchase narcotics from such suspected persons.

If, then, you the jury should find from the evidence that before anything at all occurred respecting the alleged offense involved in this case, the accused was ready and willing to commit crimes such as those charged in the indictment whenever opportunity was offered, and the Government merely offered the opportunity, the accused is not entitled to the defense of unlawful entrapment. If, on the other hand, the jury should find that the accused had no previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the Government, then the prosecution has seduced an innocent person, and the defense of unlawful entrapment is a good defense and the jury should acquit the accused.

You must consider the defense of entrapment as to each count of the indictment. It is a question of fact to be decided by you from all the evidence in the case.

You are instructed to totally disregard any remarks made by the United States Attorney that the life or safety of any person might be put in jeopardy if a name is disclosed.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that by which men give their attention to any question which depends upon
234 evidence presented to them for the exercise of their judgment. You are expected to use your good sense, to consider the evidence for the purpose only for which it was admitted, and in the light of your knowledge and the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that

if no such doubt remains, the Government is entitled to the verdict.

The jury are expected to agree upon a verdict where you can conscientiously do so. You are expected to consult with one another in the jury room, and any juror should not hesitate to change or abandon his point of view if convinced his point of view is erroneous. In determining what your verdict shall be you are to consider only the evidence before you in the light of your experience. Any testimony as to which objection has been sustained and any testimony ordered stricken must be wholly left out of your argument and disregarded.

Any opinion of the judge of the guilt or innocence of the defendant if directly or inferentially expressed in these instructions, or otherwise at all during the trial, is not binding upon you, for, as stated at the beginning of these instructions to you, the jury, exclusively belongs the duty to determine
235 the facts, but the law you must accept from the court as correctly declared in these instructions.

You will retire to the jury room and select one of your members as foreman, and when all twelve of you have agreed upon a verdict, the clerk has prepared a blank form of verdict which the foreman will fill in the blanks, sign his name and date it, and the twelve of you will return to this courtroom. It will be necessary during the period of your deliberations you be kept together and not be separated, and that you do not permit any person to speak to you, or speak to anyone else, except to me, the judge, and then only through the bailiff.

The clerk will swear the bailiff.

Are there any other objections?

Mr. REINHARDT. No, your Honor.

The COURT. The exception is the one which you——

Mr. REINHARDT. I have only made——

The COURT. —which you have made on the one instruction?

Mr. REINHARDT. Yes, your Honor.

The COURT. Very well.

Send the exhibits up. Are they all there, including the letter?

The CLERK. Yes, your Honor.

The COURT. The alternate is excused.

(The bailiff was sworn to take charge of the jury and the jury retired to deliberations at 11:39 o'clock a.m.)

236 (At 2:27 o'clock p.m., the jury returned to the courtroom.)

The COURT. United States versus Saldana, No. 26,878. The record will show the defendant is present in person and by counsel, and the jury is present, and each one in his or her place.

Ladies and gentlemen of the jury, have you arrived at a verdict?

The FOREMAN. We have.

The COURT. Will the foreman hand the verdict to the bailiff? The clerk will read the verdict.

JURY VERDICT

WE, THE JURY, in the above entitled case, find the defendant LEONARD SALDANA guilty as charged in Count II of the Indictment, guilty as charged in Count III of the Indictment, guilty as charged in Count IV of the Indictment, and guilty as charged in Count V of the Indictment.

237 (S) BYRON H. DAWSON,
Foreman of the Jury.

Dated: This 7th day of August, 1958.

Is that your true verdict, so say you one and all?

JURORS. Yes.

The CLERK. Mr. Reinhardt, do you wish the jury polled?

Mr. REINHARDT. Yes.

The CLERK. Mr. Robert C. Griffin, is it your true verdict that the defendant Leonard Saldana is guilty as charged?

Juror GRIFFIN. Yes.

The CLERK. Mr. Bryon H. Dawson, is it your true verdict that the defendant Leonard Saldana is guilty as charged?

Juror DAWSON. Yes.

The CLERK. Corrine D. Bury, is it your true verdict that the defendant Leonard Saldana is guilty as charged?

Juror BURY. Yes.

The CLERK. Cecelia H. Bishkow, is it your true verdict that the defendant Leonard Saldana is guilty as charged?

Juror BISHKOW. Yes.

The CLERK. Patsy O. Montgomery, is it your true verdict that the defendant Leonard Saldana is guilty as charged?

Juror MONTGOMERY. Yes.

The CLERK. Hershel W. Sears, is it your true verdict that the defendant Leonard Saldana is guilty as charged?

Juror SEARS. Yes.

238 The CLERK. Mr. William J. Carsten, is it your true verdict that the defendant Leonard Saldana is guilty as charged?

Juror CARSTEN. Yes.

The CLERK. Quama M. Yagusak, is it your true verdict that the defendant Leonard Saldana is guilty as charged?

Juror YAGUSAK. Yes.

The CLERK. Rose Woodall, is it your true verdict that the defendant Leonard Saldana is guilty as charged?

Juror WOODALL. Yes.

The CLERK. Mildred Franklin, is it your true verdict that the defendant Leonard Saldana is guilty as charged?

Juror FRANKLIN. Yes.

The CLERK. James L. Cass, is it your true verdict that the defendant Leonard Saldana is guilty as charged?

Juror CASS. Yes.

The CLERK. John O. Horn, is it [illegible]ur true verdict that the defendant Leonard Saldana is g[illegible]y as charged?

Juror HORN. Yes.

The COURT. The clerk will [illegible]rd the verdict and judgment of guilty as to each of the f[illegible] counts.

Ladies and gentlemen o[illegible]e jury, thank you very much. You are excused un[illegible]otified.

239 [Clerk's Certific[illegible] to foregoing transcript omitted in printing.]

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PETITION NOT PRINTED

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960
No. 176

LEONARD SALDANA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER.

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BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER.

Interest of Amicus Curiae.

The American Civil Liberties Union of Southern California is an organization dedicated to the preservation of the rights guaranteed by the Bill of Rights of the United States Constitution including the rights to a speedy trial and to the fair administration of justice. The decision of the Court below in the instant case appears to *amicus curiae* to have sanctioned a denial of both. Hence this brief is being filed, pursuant to Rule 42(1), with the consent of Petitioner and the Government.

Preliminary Statement.

Your *amicus* presents this brief out of a profound concern for the speedy, responsible and even-handed administration of justice. While public feeling runs strong against offenders such as Petitioner has admitted himself to be, that very fact calls for the most discriminating review of the procedures whereby his conviction was reached and his sentence meted out. The true test of the effectiveness of our "civilized standards of procedure" (*McNabb v. United States*, 318 U. S. 332, 340) lies in their scrupulous observance in the trials of those accused of heinous offenses or other conduct likely to evoke strong social condemnation. This is a case that calls upon the supervisory powers of this Court that both the reality and the appearance of justice may be maintained.

No separate statement of facts is here presented. Your *amicus* relies on Petitioner's statement of the case after having carefully read it and having become satisfied from an independent examination of the record that it is full and fair.

ARGUMENT.

I.

Petitioner Was Denied a Speedy Trial and for Reasons Which Are Themselves Subversive of the Fair Administration of Justice.

When his case was before Judge Clarke on June 26, 1958, Petitioner did what hundreds of criminals do every day in our federal courts. Having satisfied himself, with the advice of counsel, that he was guilty he determined to admit his guilt and obtain an early determination of his case so as to begin as quickly as possible the payment of his debt to society. To these ends his lawyer, as is done every day in our federal courts, worked out with the prosecutor a settlement of the litigation whereby the government obtained a conviction on two counts in return for dismissal of the remaining counts. This is a long recognized method of avoiding a trial of the obvious so as to save the resources of the courts and the law enforcement agencies for the trial of real issues. It expedites both the administration of justice in general and the completion of the particular case. It is probably the closest approach American courts have been able to make to the Anglo-Saxon objective of speedy justice in criminal cases. Its long use by private practitioners and prosecutors as well as its countenancing by the courts is the strongest possible recognition of its propriety and effectiveness.

If the accused in our system has any control over the kind of trial he is to receive, it is exercisable on the

question of pleading guilty or putting the government to its proof. Petitioner before Judge Clarke used his unquestioned right to enter a plea of guilty. As your *amicus* understands the law this right, voluntarily and intelligently exercised and not induced by fear or favor, is subject to no qualification.[1] So plain is this proposition that the Federal Rules of Criminal Procedure (Rule 32(d), 18 USC) would seem to recognize only one form of motion to withdraw such a plea, viz., a motion of the accused;[2] and the duty of the trial court to accept such a plea and forego trial is unquestioned. *Adams v. United States, ex rel. McCann*, 317 U. S. 269, 276; Clark's Criminal Procedure, (2d Ed.; Mikell, 1918) p. 429.

The plea having been entered the trial court's duty was to pass sentence. Rather on the government's motion, sentence was delayed. The purpose of this delay was to afford the prosecutor the means of exacting from Petitioner the testimony the government desired against a co-defendant. And this the trial court recognized and acceded to. [IR 11.] The delay of sentence, then, was a cat and mouse game in which the court, on the prosecutor's demand, agreed to hold imposition of sentence over Petitioner's head until the latter would have testified as the government expected him to. This

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[1]The Court's discretion under Criminal Rule 11 (18 U.S.C.) would seem to be limited to ascertaining that the plea was entered with full knowledge of the accused's legal rights and without coercion or improper inducement.

[2]This statement applies of course to pleas made advisedly, voluntarily and without unlawful inducement. We do not deal here with a plea tainted by coercion, fraud, corruption, ignorance of legal rights or constitutional protections, etc., and there is no need to speculate on the power of the court to vacate such a plea or the effects of vacating it.

would seem to be a gross tampering with the well-spring of truth, a demeaning misuse of judicial power. Whatever the circumstances[3] neither prosecutors nor judges should use their power to influence, in advance, a witness's testimony.[4] This Court has expressed grave concern over preserving the purity of the truth in judicial proceedings. *Mesarosh v. United States*, 352 U. S. 1; *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115. See also *Jencks v. United States*, 353 U. S. 657 (1957). This Court has not been unmindful of the fact that delay in the imposition of sentence may affect the credibility of a witness. *Gordon v. United States*, 344 U. S. 414, 422. The withholding of criticism of the trial court's methods there implies the necessity of it here because here the avowed purpose of delaying sentence was to influence or control testimony in the interests of the prosecution. The critical necessity that judicial administration be insulated from the taint of perjury imperatively demands that the courts themselves not countenance situations in which their sanctions so much as create the opportunity for shaping a witness's testimony.[4] Nor is the evil to be warded off simply that of calculated perjury. The prosecutor's recommendations as to sentence obviously carry weight with the court, and awareness of that fact among

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[3]Here the government was amply protected against any effort by Petitioner to pervert the truth. All of the transactions in which Petitioner was charged were "set up" by the government's undercover operative and his confidential informant.

[4]In this of course we exclude the court's power to try and in proper cases to punish individuals who have perjured themselves and to prevent obstruction of their processes. We emphasize here that it is the "prior restraint" quality of the threat that casts the shadow of impropriety.

convicted but unsentenced prisoners may be assumed. The desire to please or placate may lead only to subtle shadings in the prisoner-witness's story that will balance the scales in the government's favor. The fact is that the device here employed renders the prisoner-witness a prosecution pawn subject to influence generated by his very vulnerability if not by the zeal of law enforcement officials.

That there was delay, that it was purposeful and that its objective was to fashion a weapon of control or influence over what the prosecutor conceived his testimony should be is not open to doubt upon this record. The facts therefore fit the test laid down by this Court in *Pollard v. United States,* 352 U. S. 354, 361. The delay was "purposeful and oppressive;" it was not "accidental." It was done over Petitioner's most strenuous objection [IR 11], and he persisted in his demand to be tried on his guilty plea even before Judge Hall when the case came before him. [IR 34-A.] Here as in the *Provoo* case (*United States v. Provoo,* 17 F. R. D. 183, 198) where application of the Constitutional guaranty was approved by this Court (350 U. S. 857), the delay was "caused by the deliberate act of the government which the accused attempted to correct." *Pollard v. United States, supra,* at 362. But at bar not only has the government purposefully and oppressively caused delay but the trial court itself has participated.

II.

In the Trial Before Judge Hall Petitioner Was Subjected to Double Jeopardy.

A. When Petitioner appeared before Judge Clarke on June 26, 1958, and upon advice of counsel and with the approval of the court [IR 9, 10] entered pleas of guilty, jeopardy attached. This would seem manifestly true as to the two counts (one and two) to which such pleas were entered. See *Kercheval v. United States*, 274 U. S. 220, 223; *United States v. Sabella*, 2 Cir., 272 F. 2d 206; *United States v. Fox*, 3 Cir., 130 Fed. 56, 58. No occasion was presented before the trial court for rendering the pleas nugatory[5] and thus destroying Petitioner's exposure to jeopardy. (*Cf., e.g., Brock v. North Carolina*, 344 U. S. 424.) Rudimentary principles would therefore seem to forbid Petitioner's being forced to stand trial upon those counts.

B. The nature of the counts, to which the pleas were entered, broadens the double jeopardy protection to all acts embraced within count one. That count was a conspiracy count alleging three overt acts. [IR 4-5.] These overt acts were alleged as separate offenses in counts two, three and five. Thus surely as to all counts but count four Petitioner had before Judge Clarke, a trial on the merits.[6] Moreover as the record

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[5] *E.g.*, improper inducement, coercion, undue influence, lack of advice as to legal rights.

[6] Count four alleged an offense within the conspiracy period set out in count one and the omission of this transaction as an overt act in count one was probably inadvertent. We therefore treat this count *in pari materia* with counts two, three and five.

shows and as Petitioner argues in his brief the testimony to establish count one in its entirety was the same required to establish counts two, three and five.

The situation here, we submit, is indistinguishable, except in respects more favorable to Petitioner, from that in *Petite v. United States,* 361 U. S. 529 (1959). There the accused was indicted in two separate Districts for different offenses (conspiracy to make false statements in the Eastern District of Pennsylvania and subordination of perjury in the District of Maryland) growing out of testimony before an administrative agency. Following trial in the Pennsylvania District the accused was brought to trial in Maryland. His plea of double jeopardy was denied and after trial he was convicted. After certiorari had been granted the government moved this Court for an order vacating the judgment and remanding the cause to the trial court for dismissal of the indictment. This motion was bottomed upon the policy against more than one trial of several offenses growing out of the same transaction. The motion was granted.

Here, by pleading guilty to count one and the three overt acts there alleged Petitioner had his trial of the several offenses so charged. To require him to stand trial before Judge Hall on the same offenses put him in jeopardy on these offenses for the second time. He has been subjected to the very evil that the Constitutional protection was designed to forbid—the harassment of successive trials. *United States v. Bell,* 163 U. S.

662, 669; *Abbate v. United States,* 358 U. S. 187, esp. Brennan, J., separate opinion, at page 198.

There is one aspect of the case at bar which argues the more strongly for dismissal. In *Petite* the successive trials of the accused resulted solely from action by the prosecutors in the two Districts. But here, as will be developed at length immediately below, the initial disposition of the indictment was made by the trial judge who approved a settlement made by counsel. To subject Petitioner to another trial after a court approved settlement of the entire cause is to unsettle the conclusiveness of judicial action, to cast doubt upon the integrity of the judicial process. Under such circumstances no settlement of a criminal matter can be made with assurance.

C. Basic to the issues here presented is the effect of Petitioner's plea entered before Judge Clarke on June 26, 1958. [IR 9, 10.] It is submitted that in the understanding of court and counsel, reinforced by the long standing practice in federal (as well as state) criminal courts, there was submitted to and approved by the trial court an integrated settlement of the entire cause—all five counts of the indictment. This integrated settlement involved a plea of guilt as to two counts and a dismissal of the remaining counts. It is plain that Judge Clarke so understood and approved the pleas. Thus, as soon as the pleas had been entered the court said in response to Petitioner's expressed concern over "lost time" occasioned by delay in sentencing:

> "The Court: Would you like to have me make it five years on each Count and to run concurrently and waive time right now?" [IR 10.]

Then after acceding to the government's request for delay in sentencing so as to control Petitioner's testimony in the co-defendant's trial, the Court said:

> "The Court: I will keep my word with you at that time. It wil be five years on each Count, to run concurrently . . ." [IR 12.]

Thereupon the clerk called attention to the existence of counts three, four and five and the Court stated:

> "The Court: We are going to hold those, hold disposition until July 21st at 2:00 p.m." [IR 13.]

In this context, illuminated by practice well known to the entire bench and bar, the purpose and intent of the court, as well as of prosecution and defense, was unmistakably to have the defendant convicted on counts one and two and dismissed as to the balance. This as we have observed is an honorable and honored practice in the administration of criminal justice. It affords the accused a speedy trial. It serves the public interest in prompt justice, eliminating the congestion of the courts and bringing the confessed criminal the sooner to the insulation from society and the rehabilitating effects of our penology. To repudiate such a practice by giving a different judge power to undo it without cause is to invite abandonment of the means whereby an extremely large proportion of criminal cases is disposed of without the time and expense of trial. In its present

state it is to be doubted that the federal judiciary, without the advantage of the settlement procedure here invoked, is equipped to dispose of its case load within the Constitutional imperative of a speedy trial.[7]

By practice and tradition, if not by explicit statute or rule, the legal posture of Petitioner's case at the end of the proceedings on June 28, 1958, was that he had been exposed to jeopardy on all five counts and all five counts had been disposed of. There remained only the formal entry of a judgment the contents of which had already been announced. It was as if a jury had

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[7]Annually in the District Courts approximately 80% of the cases of accused defendants are disposed of by plea of guilty or *nolo contendere*. The statistics are as follows:

Year	Total Defendants	Defendants Convicted and Sentenced Upon Plea of Guilty or Nolo Contendere	Percent
1952	38,622	32,734	84.8
1953	37,762	31,336	83.0
1954	42,989	35,560	82.7
1955	38,990	31,148	79.9
1956	31,811	25,029	78.7
1957	29,725	23,867	80.3
1958	30,469	24,256	79.6
1959	30,729	24,793	80.6

Source: Annual Reports, Director of the Administrative Office of the United States Courts, for the fiscal years ending June 30 of the years indicated above. These reports are appended to the Annual Reports of the proceedings of the Judicial Conference of the United States for the years indicated (Government Printing Office).

On the importance of the settlement of criminal litigation by agreement for pleas of guilty in return for dismissal of other counts in an indictment or for pleas of guilty to lesser offenses, see Orfield, "Criminal Procedure from Arrest to Appeal" (1947), pages 297, 298.

returned a verdict of guilty on counts one and two and not guilty on counts three, four and five.

This is not the case of the prosecutor's unilateral *nol pros* as to one or all counts of an indictment. It is familiar law that such is not a final disposition of a criminal charge and no jeopardy attaches.[8] *Dortch v. United States*, 203 F. 2d 709 (1953); *Buie v. United States*, 76 F. 2d 848, 849 (1935); *United States v. Fox*, 130 F. 2d 56, 58 (1942). But these cases plainly rest on the fact that the prosecutor exercises his own discretion for his own reasons. Here the prosecutor and the defense counsel made an agreement, approved by the court itself, that a certain disposition of the case would be appropriate. It was on this basis that the pleas of Petitioner were received.[9] The integrity of the administration of justice demands that an agreement

---

[8]It would seem that even in the case of the *nol pros* the proceeding in that indictment is *pro tanto* ended and a new indictment must be returned. *United States v. Rossi*, 9 Cir., 39 F. 2d 432, 433; *United States v. Fox, supra; Buie v. United States, supra.* No such indictment was found here. If the principle of the *nol pros* cases were to be followed here, Petitioner was denied his right to a grand jury accusation. See *Green v. United States*, 356 U. S. 165, 183; *Costello v. United States*, 350 U. S. 359, 361.

[9]It is this fact which distinguishes the case at bar from such cases as *The Whiskey Cases*, 99 U. S. 594, and *District of Columbia v. Buckley*, (C. A., D. C.) 128 F. 2d 217, and the casse there cited. In those situations the prosecutor and the defense made their own agreement outside of court. No action was taken in court with reference to these agreements and the court was not drawn in to an approval of them by accepting pleas as to part of the indictment and permitting dismissal of other parts. Those cases in short involved extra judicial agreement by the parties which one later sought to enforce judicially. Here the parties, having agreed to a complete settlement of the cause, submitted it for approval and obtained that approval. Judge Hall on July 29, 1958, set aside a judicial act, not the mere arrangements of counsel.

so made and so approved be kept. Absent such a rule the accused can be subjected to the same prejudice as was Petitioner here—deprivation of trial by plea, deprivation of speedy trial, delay of nearly two months in getting to trial and becoming caught in a cross fire of conflicting personalities and policies between two federal judges, with the final result that he must serve a sentence four times as long as if Judge Clarke had imposed his punishment.

In sum, on June 28, 1958, Petitioner was brought to trial upon the entire indictment and judicial disposition thereof was made to a point beyond the court's power to retrieve. Jeopardy attached as to the entire indictment, and Petitioner could not constitutionally be tried on that indictment, or the offenses charged therein, a second time.

III.

Petitioner Was Made the Victim of Capricious Action Before Judge Hall in an Incident That Reflects Upon the Fair and Impartial Administration of Justice.

The supervisory intervention of this Court is needed to redeem both the appearance and the reality of justice under law in this case. After acceptance and approval of the integrated settlement of Petitioner's case before Judge Clarke, the cause was transferred to Judge Hall, apparently upon his insistence, in connection with the scheduled trial of Petitioner's co-defendant. [IR 27.] Judge Hall, *sua sponte*, and absent anything of record to justify his action, vacated the pleas of guilty to counts one and two. [IR 30.] The reason given by Judge Hall for his unusual action was that "apparently it smacks too much of having the appearance of a bar-

gain . . . that if he would plead guilty, he would get five years." [IR 28.] The key word in this remark of course is "bargain." Judge Hall could not have referred to the agreement between counsel for as the bench and bar know perfectly well this is how settlements of litigation are arrived at. The word "bargain" refers to an agreement assertedly entered into by Judge Clarke "that if [defendant] would plead guilty, he would get five years." This is a wholly unwarranted charge of judicial misconduct which was made without support in the record and in the very teeth of counsel's assurance that "there was no bargain. This was done in open court." [IR 28.] That it was Judge Hall's assumption that Judge Clarke had participated in the improper "deal" was made crystal clear on his refusal to transfer Petitioner's matter back to Judge Clarke:[10]

> "The Court: And I can see no reason for transferring this back to Judge Clarke, because it would be merely in my opinion, confirmation of what appears to have all the earmarks of a deal.
>
> "In other words, the defendant is relying upon the fact that Judge Clarke said he was going to give him five years, so he has an understanding on his part that if, as, and when, because he pleads guilty, he is going to get five years, which might be another and different sentence than if he were tried and found guilty." [IR 34, 34-A.]

Thereafter, his pleas of guilty before Judge Clarke having been vacated, Petitioner offered to plead guilty

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[10]In the meantime the co-defendant had fled the jurisdiction and his trial could not go forward. [IR 22-25.] It was in connection only with that intended trial that the matter reached Judge Hall.

to counts one and two before Judge Hall. The latter refused to accept them, giving no reason.

Perhaps the reason underlying Judge Hall's remarkable conduct was his notion as to the aggravated nature of the offense. He twice referred to the fact that Petitioner's violations involved "15 ounces of heroin." [TR 28, 34-A.] If, indeed, that fact does point to aggravation it does not bear any relevance to the question of guilt or innocence. It is of course to be carefully weighed in fixing sentence. This truism only serves to point up the capriciousness of Judge Hall's act. His objection to the "deal" was not that Petitioner chose to be tried by plea rather than on issues of fact but rather that Petitioner would not be punished as Judge Hall thought he should have been.[11] Conduct of this sort reduces the administration of justice to a government of men, not of law. While personal differences in approach to problems of sentencing are, within limits, unavoidable in our system, judicial reaching, as in this case, to undo proper judicial action in order to effectuate a personal viewpoint distorts to the public, to the bar and to those accused of crime both the reality and the appearance of fairness under law.

The supervisory powers of this Court would be properly exercised here. Judge Hall's comments on Judge Clarke's conduct reflect upon the District Court and the administration of justice in that tribunal. His *sua sponte* vacating of Petitioner's guilty pleas and his later refusal to accept such pleas from Petitioner create the impression that in some circumstances at least the court

[11] At the conclusion of the trial before Judge Hall Petitioner's consecutive sentences totalled 20 years.

will knowingly ignore its legal limitations. And his apparent purpose to undo a conviction based upon plea and require a trial before a jury in order to afford an opportunity to impose sentence, as he personally saw fit interpolates too heavy a personal element in the dispensing of justice. Plainly these bizarre developments should be undone to restore public confidence in both the court and the individual judges concerned.

Conclusion.

For the reasons given this Court, in the exercise of its supervisory functions to see that fairness has been observed and public confidence maintained in the administration of criminal justice, should reverse the judgment below and remand this case for further proceedings in the District Court consistent with the settlement agreement approved by Judge Clarke.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF

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Los Angeles 13, California

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 176

LEONARD SALDANA,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF

Opinions Below

The District Court did not render an opinion. The opinion of the Court of Appeals (R. 104-110) has been reported at 274 F. 2d 352.

Jurisdiction

The judgment of the Court of Appeals (R. 111) was entered on December 7, 1959. The petition for writ of certiorari was granted on June 27, 1960 (R. 112; 362 U.S. 838). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions, Statute and Rules Involved

The Constitution of the United States provides in pertinent part as follows:

Amendment V:

> " . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property without due process of law; . . . "

Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . "

The pertinent part of Section 105 of the Narcotic Control Act of 1956, 70 Stat. 570, 21 U.S.C. § 174 provides as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. . . .
>
> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction un-

less the defendant explains the possession to the satisfaction of the jury."

Rule 32(a) of the Federal Rules of Criminal Procedure, 327 U.S. 854, 18 U.S.C. Appendix, provides in pertinent part:

"Sentence shall be imposed without unreasonable delay..."

Questions Presented

1. Does postponement of sentencing, at the Government's request and over defendant's objection, violate defendant's rights under the Sixth Amendment and under Rule 32(a) of the Federal Rules of Criminal Procedure, where the purpose of the postponement is to preclude defendant's adverse testimony at the subsequent trial of another person?

2. Where the court accepts a plea of guilty voluntarily and intelligently made upon advice of counsel, may such plea be vacated over defendant's objection? If such a plea may be so vacated under some circumstances, may this be done by a judge other than the one who accepted the plea, without a fair inquiry into the facts, merely because he purports to sense "the appearance of a deal"? Does jeopardy attach upon acceptance of a plea of guilty and thus bar further trial for the offenses involved? Where an indictment charges one count of conspiracy and four substantive counts comprehending the overt acts of such conspiracy, does disposition of the conspiracy count and one substantive count by guilty plea, with the understanding that the other counts will be dismissed, bar a subsequent trial on those other counts?

3. Entrapment being the only proper issue for the jury, is defendant denied a fair trial where the Government did

not make the informer available to defense counsel until just before defense counsel called the informer as a witness; where the informer refused, after being counseled by the Assistant United States Attorney, to discuss the case with defense counsel; and where the trial court refused to allow defendant to treat the informer as a hostile witness and refused to allow defendant to inquire fully into the relationship between the Government and the informer?

4. Does the throwing of narcotics by an arrested person toward the arresting officer, following a gunpoint arrest, constitute a "sale" within the meaning of 21 U.S.C. § 174?

5. Does the law recognize two kinds of entrapment as set forth in the jury charge, namely, "lawful entrapment" and "unlawful entrapment", and further does the entrapment instruction misstate the burden of proof re entrapment?

Statement of the Case

Indictment

The indictment is in five counts, each alleging a violation of 21 U.S.C. § 174. Count one charges that from April 28, 1958 to June 11, 1958 petitioner and one Palomino conspired to receive, conceal, sell and facilitate the transportation, concealment and sale of narcotic drugs (R. 1-2).

Count two charges that on or about April 28, 1958 petitioner and Palomino knowingly and unlawfully sold and facilitated the sale to one Jayme Licuanan of one ounce, 423 grains of a narcotic drug, knowing the same had been unlawfully imported (R. 2). Counts three, four and five are substantially similar to count two, differing only in the allegation of date of alleged sale, the amount of narcotic

drug involved, and, with respect to count five, the addition of Victor Segura as a purchaser (R. 2-3).

The deliveries involved in counts two, three and five are specified as the overt acts to effect the conspiracy charged in count one.*

Plea of Guilty, Delay in Sentencing, and Vacation of Plea

Petitioner was arraigned before District Judge Thurmond Clarke on June 16, 1958. At that time, petitioner, being indigent, was assigned counsel, and, upon such appointment, Judge Clarke suggested that petitioner plead not guilty since his codefendant Palomino had pleaded not guilty (R. 12-13). Accordingly, petitioner pleaded not guilty to all five counts (R. 13).

Subsequently, after full consultation with counsel, petitioner determined to plead guilty. Counsel then inquired of the Assistant United States Attorney as to the plea which the Government would accept. Counsel was informed that in cases of this type the standard practice was to consent to a plea of guilty on two counts and to dismiss the remaining counts, and that the Government would do so in this case (R. 27).

On June 26, 1958, petitioner, by his counsel, moved to withdraw the plea theretofore entered. Such motion was made before Judge Clarke, as judge then presiding over the master criminal calendar. With permission of the court, petitioner withdrew his plea of not guilty on counts one and two and pleaded guilty to those counts (R. 4; R. 15).

* The delivery on May 13, 1958 involved in count four was within the conspiracy from April 28, 1958 to June 11, 1958 comprehended by count one, and apparently the failure to specify that delivery among the overt acts specified in count one was an inadvertence.

Following acceptance of the plea, petitioner requested immediate sentencing, pointing out to the court that the time served between plea and sentencing was time for which he would get no credit (R. 15-16). The court then clearly indicated that a five-year sentence would be imposed on each of the two counts to run concurrently and to commence immediately, and that the other counts would be dismissed (R. 16). At this point, the Government objected. Its objection was not to the length of the sentence but solely to the formal completion of sentencing procedures prior to petitioner's testifying at the trial of Palomino (R. 16). Over petitioner's objection (R. 16), the court delayed the formal completion of sentencing procedures until a date after Palomino's trial, but twice thereafter repeated that its decision to sentence petitioner to five years on each count, to run concurrently, was final.* The formal completion of the dismissal of the other counts was likewise delayed (R. 17).

On July 9, 1958, at a proceeding concerned with Palomino alone, and in the absence of petitioner and petitioner's counsel and of any counsel for the Government, District Judge Peirson Hall ordered petitioner transferred before him for sentencing (R. 4-5). Eventually (R. 5; R. 18-20) petitioner's cause was continued to July 29th, the time to which Palomino's trial had been continued.

On July 29th, Judge Hall was informed that Palomino had fled the jurisdiction, but that Palomino's codefendant, petitioner, was in court (R. 21-23). Upon being advised that petitioner was there only for sentencing, Judge Hall an-

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* Judge Clarke said, referring to his earlier statement as to the length of sentence made following acceptance of the guilty plea:

"Well, I will keep my word and I will make it five years on each count, to run concurrently, on the 21st, and we will have him here on the 21st . . ." (R. 17).

"I will keep my word with you at that time. It will be five years on each count, to run concurrently" (R. 17).

nounced that he was not going to sentence petitioner at that time (R. 23). When petitioner's counsel then sought to fully advise Judge Hall as to what had transpired prior to that date, Judge Hall, on his own motion and over petitioner's objections, vacated petitioner's guilty plea, ordered that a plea of not guilty be entered as to all five counts of the indictment, and set the case for trial in his court (R. 23-25).

The ground relied on by Judge Hall for his action was that Judge Clarke's acceptance of the guilty plea "Apparently . . . smacks too much of having the appearance of a bargain. . . . That if [Saldana] would plead guilty, he would get five years" (R. 24). Presumably the court had in mind a bargain to which the first district judge was a party, since the type of arrangement between the Government and petitioner's court-appointed counsel is common and is favored as a matter of judicial policy.

There was in fact no bargain between the first judge and petitioner or his counsel (R. 26-29). Judge Hall in vacating the plea did not purport to rely on the actual existence of *any* bargain, only on the appearance of one (R. 24). There was in fact no appearance of any bargain (R. 23-24).

In proceedings requested by petitioner on August 1, 1958, petitioner unsuccessfully reiterated his objections to the court's actions of July 29, 1958 (R. 26-29). Judge Hall denied a motion to return the case to Judge Clarke (R. 29) and refused to accept petitioner's offer to reinstate his pleas of guilty to counts one and two (R. 29).

Petitioner's objection to the vacation of his guilty plea and to the holding of the trial was reiterated immediately prior to the impaneling of the jury (R. 30-31).

Evidence

The undisputed evidence adduced at the trial shows the following facts:

(1) On April 28, 1958, a government agent (Licuanan) and a confidential informer (Singh), both previously unknown to petitioner, approached petitioner;

(2) they bore a note (R. 126) from petitioner's cousin addressed to petitioner which stated that the cousin was in jail and that Singh was going to help raise bail;

(3) Licuanan pretended that he was a peddler looking for a source of supply and that he would use some of the profits to help the cousin;

(4) Licuanan sought from petitioner an introduction to one Pancho, a supplier;

(5) at first, petitioner demurred to making such introduction (the evidence is in conflict as to his reasons for so doing);

(6) following further discussion, petitioner then made a phone call and informed Licuanan that he should return that evening;

(7) that evening petitioner delivered narcotics to Licuanan;

(8) as a result of further requests from Licuanan, petitioner delivered narcotics to Licuanan on May 7, 1958 and on May 13, 1958.

As a result of further overtures by Licuanan, arrangements were made for Licuanan to obtain narcotics from petitioner on May 21, 1958. However, the uncontroverted evidence given by the Government's witnesses shows

(i) that Licuanan pulled his gun and placed petitioner under arrest while petitioner still had possession of the narcotics and before petitioner made any attempt to transfer the drug to anyone, and

(ii) that thereafter petitioner threw the bag containing the narcotics at Licuanan and attempted to escape.

There was no contention that any money or other consideration had passed to petitioner in connection with this last transaction.

The only issue properly before the jury was entrapment. Other than petitioner and agent Licuanan, the only witness to the events upon which the defense of entrapment was based was the confidential informer, Singh. The Government did not call Singh as a witness. Moreover, at first the Government refused to name the informer (R. 43); subsequently, however, it did produce him on the day that petitioner was to call him as a witness (R. 46). However, Singh, after being counseled by the Assistant United States Attorney, refused to talk to petitioner's counsel (R. 77). Immediately thereafter, when petitioner called Singh to the stand, the court would not allow petitioner to treat Singh as a hostile witness (R. 76-79) and, further, sustained objections to the following questions propounded by petitioner's counsel:

(a) "Would you tell the jury the nature of that conversation [between Singh and petitioner's counsel]?" (irrelevant)* (R. 76);

(b) "Did you tell the petitioner that the reason you wanted to get drugs was in order to raise money to get Julio Contreras out of jail?" (leading) (R. 81);

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*The ground given for the objection is shown in parentheses following the question.

(c) "Are you an employee of the United States government?" (leading and calling for a conclusion) (R. 81);

(d) "Will you describe for the jury your present relations with the United States government?" (too remote) (R. 81);

(e) "Are you presently engaged in narcotic activity on behalf of the United States government?" (argumentative, irrelevant and immaterial) (R. 81);

(f) "Have you been arrested in the last six months for narcotic violation?" (none) (R. 85).

Furthermore, the court refused to permit an examination of Singh's arm (no foundation) (R. 82), and ruled that petitioner's questions concerning narcotics convictions were limited to Singh's felony convictions (R. 86). In addition, the court had previously sustained the Government's objection, on the ground of irrelevancy and immateriality, to a question addressed to Licuanan as to whether he had engaged in similar transactions accompanied by Singh (R. 54).

Entrapment Instruction

The entire instruction on entrapment is founded upon the proposition explicitly set forth therein that "The law recognizes two kinds of entrapment, unlawful entrapment and lawful entrapment".* Further, the entrapment instruction does not mention the burden of proof and in fact directs the jury to decide the issue merely by balancing the evidence. Petitioner's proposed instruction was rejected and petitioner's objection to the given entrapment instruction given was overruled (R. 6; R. 99-101).

* The full instruction (R. 140-141) is set out verbatim as Appendix A of this brief.

Verdict

Petitioner was convicted on counts two, three, four and five (R. 143). Petitioner's motion for judgment of acquittal had previously been granted as to count one (R. 71-72).

Sentence

Petitioner was sentenced to a total of twenty years imprisonment, as follows: Ten years on count five, five years on count four, five years on count three, all to run consecutively, and five years on count two,* to run concurrently with the sentence on count three (R. 8-9).

Appeal

The United States Court of Appeals for the Ninth Circuit affirmed petitioner's conviction (R. 104-106), Circuit Judge Hamley dissenting in part (R. 107-110).

Summary of Argument

1. The postponement of sentencing, at the Government's request and over petitioner's objection, for the purpose of precluding petitioner's adverse testimony at the trial of another person constitutes a denial of a "speedy trial" under the Sixth Amendment to the Constitution and an "unreasonable delay" in sentencing under Rule 32(a) of the Federal Rules of Criminal Procedure. Sentencing proceedings are comprehended by "speedy trial." Delays caused by the deliberate act of the Government are unlawful, particularly where, as here, the delay is for an improper purpose. The practice of postponing sentencing until after the de-

* Initially petitioner's sentence on count two was improperly suspended (R. 7-8), but this oversight was corrected at petitioner's instance.

fendant testifies at another person's trial encourages perjury and should be condemned by this Court.

The postponement prejudiced petitioner in several respects, including his subjection to a trial despite his prior plea of guilty and the imposition of a 20-year sentence in lieu of the five-year term announced by the district court.

2. The trial and imposition of sentence following the court's vacation of petitioner's plea of guilty was unlawful. There is no power in the district court to vacate a duly accepted plea of guilty over the objections of the defendant. Historically, the courts had no authority to refuse to accept pleas of guilty. *A fortiori*, there was no authority to vacate such pleas once accepted. Rule 11 of the Federal Rules of Criminal Procedure has modified the common law by giving district courts authority to refuse to accept guilty pleas. However, no modification has been made with respect to vacation.

Pleas of guilty constitute an essential part of the administration of the criminal law. Ninety per cent of the criminal prosecutions in the federal courts are disposed of in this manner. A defendant having so pleaded, has been "convicted"; the court has nothing to do but enter judgment and impose sentence. The defendant may not withdraw his plea unless he can demonstrate that it was obtained by fraud, fear, or in some similar vitiating manner. Even a showing of innocence is not in itself grounds for withdrawal. Under these circumstances, the defendant, having pleaded, is entitled to have that plea stand. He has made his choice and has placed himself once in jeopardy. The court having acquiesced in that conviction is not thereafter free to rewrite the record and subject him to further trial.

Assuming *arguendo* that there is some authority in the district court to vacate a defendant's plea of guilty over

his objections, the only circumstances which would justify such action are those which affect the validity of the making of the plea—e.g., fraud, fear, ignorance or inadvertence. Here the vacation constituted a clear abuse of discretion. The only ground relied upon by Judge Hall was that Judge Clarke's acceptance of the plea, "Apparently . . . smacks too much of having the appearance of a bargain. . . . That if [petitioner] would plead guilty, he would get five years" (R. 24). However, the mere "appearance" of a bargain cannot justify such vacation. More important, there was no bargain, and there was no appearance of any bargain; and the record so reflects.

Further, the procedures used to vacate petitioner's plea violate standards of due process. No investigation as to the facts was made by Judge Hall, and no hearing was afforded petitioner, notwithstanding the fact that Judge Hall had been informed that there had been no discussion or understanding of any kind with Judge Clarke prior to the time he accepted petitioner's guilty plea.

Regardless of the district court's authority to vacate petitioner's guilty plea, the original acceptance of that plea barred any further trial. Having been placed once in jeopardy by that plea, petitioner could not be subjected to further trial. Jeopardy attaches at the time the plea is accepted. Such was the view of Blackstone and such is the rule today.

The acceptance of the pleas on counts one and two barred further prosecution on counts three, four and five as well. Acceptance of a guilty plea under the circumstances here involved constitutes a disposition of all charges contained in the indictment. That formal dismissal was delayed is immaterial. The policy of expediting criminal proceedings by accepting guilty pleas to certain counts requires that further trial on the remaining counts be barred. The Double

Jeopardy clause precludes successive prosecutions for a series of related acts having a common purpose or design. This rule is applicable to prosecutions after conviction by trial, and it is applicable to counts which have been disposed of in the course of obtaining a conviction by plea. This is particularly true where the conviction is upon a conspiracy count which expressly comprehends substantive offenses. Thereafter those same substantive offenses may not be made the subject of additional prosecution.

Fundamental fairness and the orderly administration of the criminal law prohibit the sentencing of petitioner to a term in excess of five years. A five-year sentence was announced by the district court. Formal imposition was delayed for an improper purpose over petitioner's objection. The good word and good faith of the court require that no sentence in excess of the announced sentence be imposed.

3. Petitioner was denied a fair opportunity to determine and test vital evidence within the knowledge of a key witness to the defense of entrapment—the confidential informer who set up the transactions charged. The assistant United States Attorney's counselling of that witness, Roy Singh, with respect to his discussing the case with petitioner's counsel was a violation of due process under the circumstances here present. Although the Government failed to call Singh, its own agent, as a witness, thus compelling petitioner to call him as a part of his defense, the trial court refused to permit petitioner to treat Singh as a hostile witness *ab initio*, refused to allow petitioner to inquire into facts material to show hostility, and sustained objections to questions designed to show bias. In each respect, the trial court was in error.

4. The denial of petitioner's motion for judgment of acquittal as to count five was error. Count five charges a

"sale" of narcotics. The uncontroverted evidence demonstrates as a matter of law that no "sale" occurred. The undisputed facts are that, after petitioner was arrested at gunpoint, he threw the bag containing narcotics at the arresting officer and fled.

The Court of Appeals held that no "sale" had occurred as of the time the arrest was made, but that the throwing of narcotics after the gunpoint arrest created a question of fact for the jury as to whether petitioner intended to consummate the "sale" by that act. As the dissenting Judge correctly stated, whether there was sufficient circumstantial evidence of the requisite intent was a matter of law. He then concluded, "I do not find a single circumstance surrounding the event which would tend to show that Saldana had a deliberate and voluntary intention of consummating the sale."

Furthermore, the uncontroverted evidence shows that a cash sale was contemplated and that each prior transaction had constituted a cash sale; yet there was no evidence of any consideration passing to petitioner in connection with the narcotics involved in the fifth count.

5. The district court's entrapment instruction, given over petitioner's objection, was erroneous in two respects. That instruction was couched in terms of "lawful entrapment" and "unlawful entrapment". The defense involved is simply "entrapment", and the terms "lawful" and "unlawful" have no applicability to such defense. Entrapment is a valid defense whether the conduct of the entrappers was lawful or unlawful. Such an instruction can only confuse and mislead the jury.

Furthermore, the entrapment instruction directs the jury to decide the entrapment issue merely by balancing the evidence. In so doing, the instruction misleads the jury as to

the burden of proof. Once inducement by the Government is shown, the burden is on the Government to prove beyond a reasonable doubt that the inducement was not the cause or creator of the crime. This allocation of the burden of proof must be expressly set forth in the entrapment instruction; a mere general instruction re burden of proof elsewhere in the charge is not sufficient.

I.

The Postponement of Sentencing for an Improper Purpose, at the Government's Request and Over Petitioner's Objection, Violated Petitioner's Rights Under the Sixth Amendment and Under Rule 32(a) of the Federal Rules of Criminal Procedure.

Following acceptance by Judge Clarke of petitioner's guilty plea, petitioner, through his court-appointed attorney, requested immediate sentencing, pointing out that the time served between plea and sentencing was time for which he would receive no credit toward service of his sentence (R. 16). The court then clearly indicated that a five-year sentence would be imposed on each of counts one and two, to run concurrently and to commence immediately, and that the other counts would be dismissed (R. 16). At this point, the Government requested that formal imposition of sentence be delayed, and the request was granted by the court over petitioner's objection. In making the request, the Government indicated no concern over the length of sentence. Rather, it was motivated by a desire to protect its interests in another prosecution. It sought to preclude possible adverse testimony by petitioner at that other trial.*

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* The Government, in requesting the delay, stated:

"... policywise, where there is another defendant who is going to stand trial, ... it is usually advisable to not sentence one defendant first, in that we don't know what his

The Government's interest was protected;* however, this was achieved at the expense of petitioner, who was seriously prejudiced by the delay in at least three respects:

(1) He was required to serve an additional two months of "dead time," i.e., his sentence commenced on August 18, 1958, rather than on June 26, 1958, and he was in jail throughout the interim;

(2) He was subjected to the ordeal of a pointless trial which he otherwise would have avoided; and

(3) He was ordered to serve a 20-year sentence in lieu of the five-year sentence he would otherwise have served.**

The delay in the formal imposition of petitioner's sentence violated rights afforded him by the Sixth Amendment and by Rule 32(a) of the Federal Rules of Criminal Procedure. The Sixth Amendment guarantees the right to a "speedy trial." While this court has not decided whether the right to a speedy trial includes the right to a speedy sentence, in *Pollard* v. *United States*, 352 U.S. 354 both the majority and dissenting opinions recognized the existence of this question.†

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intentions are and we don't feel it is permissible to pass sentence now. . . . we never can tell that he is going to appear as a witness" (R. 16).

The court then commented on the request:

"I see. They are afraid that he might get on the stand at the other trial and take all the blame" (R. 16).

* Petitioner did not testify at the other trial. In fact, that trial was never held, since the other person fled the jurisdiction.

** While prejudice was present here, we believe that prejudice need not be shown where a person is deprived of his right to a speedy trial. Cf. *United States* v. *Provoo*, 17 F.R.D. 183, 203 (D.C. Md. 1955), aff'd per curiam 350 U.S. 857.

† The "speedy trial" provisions of the Constitutions of Pennsylvania [Art. I, Sec. 9] and of Virginia [Art. I, Sec. 8] have been

The term "trial" as used in the Sixth Amendment has been held to include sentencing proceedings. For example, a defendant is entitled to counsel at the time of sentence.* A clear expression of the reasons for including sentencing proceedings within the Sixth Amendment trial protections is found in *Thomas* v. *Hunter*, 153 F.2d 834, 839 (10th Cir. 1946), where Judge Huxman said, "To hold that return of verdict or sentence thereafter is no part of the trial is to accord the term trial a very narrow and technical definition when the question under consideration is the violation of human rights and liberty guaranteed by the Constitution." A plea of guilty does not, of course, waive any Sixth Amendment rights other than as to a determination of guilt; all other rights are preserved.** The right to a speedy sentence must apply equally to all convicted persons, regardless of the procedure by which conviction is obtained.

We believe that the proper rule is that the term "speedy trial" includes the entire prosecution of a criminal case. We believe that under the Sixth Amendment every defendant is entitled to a prompt disposition of pending charges so that he may know, without unjustifiable delay, what penalty, if any, will be imposed upon him. Just as a person charged with a crime should not be compelled to live for an indefinite period with the threat of trial hanging over him, so a person convicted of a crime should not be compelled

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held to guarantee the right to a speedy sentence. See *Commonwealth* v. *Ashe*, 368 Pa. 211, 82 Atl. 244, 248 (1951), cert. den. 342 U.S. 862; *Powell* v. *Commonwealth*, 182 Va. 327, 28 S.E.(2d) 687, 692 (1944).

* Cf. *Schwab* v. *Berggren*, 143 U.S. 442; *Hopt* v. *Utah*, 110 U.S. 574.

** E.g., see *United States* v. *Steese*, 144 F.2d 439 (3d Cir. 1944) (the "right to counsel" provision of the Sixth Amendment applies equally to persons convicted by plea of guilty and those convicted by jury).

to live for an indefinite period with the threat of sentence hanging over him.* Fundamental fairness requires that the sentence, as well as the preconviction proceedings, be "speedy" and that an accused, whether acquitted or convicted, be advised promptly of his fate.

However, the constitutional issue need not be met in the instant case, for the trial court's action falls squarely within the prohibition of Rule 32(a). Rule 32(a) requires that "Sentence be imposed without unreasonable delay." **

The *Pollard* case, as well as the "legislative history" † of Rule 32(a) strongly support the view that a delay for the convenience of the Government is "unreasonable." In *Pollard*, this Court said (352 U.S., at 361), "The delay must not be purposeful or oppressive." At page 362, this Court said further, "We do not have in this case circumstances akin to those in Petition of Provoo (citations) where Judge Thomsen found the delay 'caused by the deliberate act of the Government. . . .'" While *United States* v. *Provoo*, 17 F. R. D. 183 (D.C. Md. 1955), which was affirmed per curiam by this Court (350 U.S. 857), held that delay caused by the deliberate act of the Government in bringing a case to trial is unreasonable, the *Pollard* case, citing *Provoo*,

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* See *United States* v. *Dillon*, 183 F.Supp. 541 (S.D.N.Y. 1960), in which the guilty pleas of four defendants had been accepted in 1952, but sentence had not been imposed by the time the other defendants went to trial in 1960.

** Cf. *Pollard* v. *United States*, *supra*, at p. 361, "The time for sentencing is of course not at the will of the judge."

† The pertinent part of the Rule 32(a) is "substantially a restatement" of Rule I of the Criminal Appeals Rules of 1933, 292 U.S. 661. Notes of Advisory Committees on Rules, Note to Subdivision (a) of Rule 32. Rule I prohibited any delay except to permit either (1) a defense motion to vacate the conviction or (2) a presentence investigation where such was deemed required in the interest of justice. Delay for the convenience of the Government was not permitted.

applied the same principle where delay in sentencing was the issue (352 U.S., at 362).

In *Pollard*, this Court found that the delay was inadvertent and not caused by the deliberate act of the Government; it also found that no delay had occurred after discovery of the error and that the petitioner had made no objection to the delay. In the case at bar, however, the entire delay was attributable to the Government's action in insisting that sentencing be postponed until after another person's trial.* All of the delay involved occurred after this deliberate governmental act, and petitioner objected to the delay at the appropriate time. All of the *Pollard* tests are met in this case. Furthermore, not only was the Government's act deliberate, but it was for an improper purpose.

The delay in sentencing petitioner was for an improper purpose and "unreasonable." The sole purpose of the delay was to preclude his adverse testimony at the trial of another person. This practice in no way serves the interests of justice. Not only does such a practice deprive the person awaiting sentence of his own basic rights, but also it encourages him to commit perjury at the trial of another person. A convicted person awaiting sentence must necessarily be influenced by the fact that his own future is in doubt when he is called to the stand. He would ordinarily

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* The fact that the court acceded to the Government's request does not relieve the Government of the responsibility for the consequences of its request. Cf. *United States* v. *Sabella*, 272 F.2d 206 (2d Cir. 1959), in which the Government moved to set aside an illegal sentence. The court went beyond the motion and "purported to vacate the conviction and dismiss the indictment" as well. Later, when a new indictment was brought the defendants raised double jeopardy, and the Second Circuit upheld this contention. In so doing, the court said that not only the setting aside of the sentence but also the vacation of the conviction and dismissal of the indictment were the "government's doing" (p. 208).

be reluctant to give testimony unfavorable to the prosecution. If his attitude is deemed "uncooperative," he knows he will shortly face the prosecutor's wrath. He has little choice but to seek to please the Government. The cause of criminal justice does not benefit from convictions obtained in this manner.

The condemnation by this Court of the practice of using sentences as a club over the head of prospective witnesses would in no way hamper the enforcement of our criminal laws. In the event a witness fails to tell the truth, he may be prosecuted for perjury (18 U.S.C. § 1621; Cf. 18 U.S.C. § 1406). This is the remedy which Congress has adopted for dealing with untruthful witnesses. It is a remedy which provides safeguards for witnesses whose testimony appears false to the prosecution. Congress did not intend that such witnesses be punished by increasing their sentences for other crimes; for this constitutes punishment without trial. Yet this is the only rationale for the practice followed by the Government herein.

We believe that this Court should condemn the practice followed by the prosecution in this case. A delay is reasonable only when its cause is consistent with the interests of justice. Here the delay was for a purpose which is contrary to the interests of justice.

Whatever meaning might be given the word "unreasonable" in the absence of the Sixth Amendment, the commands of that provision compel the conclusion that delay for the purpose here involved cannot be tolerated. So, too, does the proper administration of the criminal law. As was said in *Rosenberg* v. *United States*, 346 U.S. 273, 287:

> "This Court has the responsibility to supervise the administration of criminal justice by the federal judiciary. This includes the duty to see that the laws are not only enforced by fair proceedings, but also that

the punishments prescribed by the laws are enforced with a reasonable degree of promptness and uncertainty."

II.

Petitioner's Trial and Sentence Thereon Was Illegal.

A. The Trial Court Had No Power to Vacate, Over Petitioner's Objections, Petitioner's Duly Accepted Plea of Guilty for the Sole Purpose of Holding a Trial Upon the Identical Charge.

Following the postponement of formal imposition of the five-year sentence announced by District Judge Thurmond Clarke, District Judge Pierson Hall, without notice to the Government or to petitioner, ordered the case transferred to his docket. Subsequently Judge Hall vacated petitioner's guilty plea, ordered that a plea of not guilty be entered as to all five counts, and set the case for trial in his court. Judge Hall's actions were *sua sponte* and over petitioner's objections. The basis for this action was that Judge Clarke's acceptance of the guilty plea "Apparently . . . smacks too much of having the appearance of a bargain . . . That if [petitioner] would plead guilty, he would get five years." Petitioner was thereafter tried before Judge Hall on all counts, and convicted on four counts, despite petitioner's repeated protests as to the legality of the purported vacation and trial. Petitioner was then sentenced to twenty years by Judge Hall.

Judge Hall's action in vacating petitioner's duly accepted plea of guilty and compelling petitioner to submit to trial was unlawful. A court has no authority to vacate a duly accepted plea over a defendant's objection. Such a plea constitutes a conviction, and a defendant, having been convicted, may not subsequently be harassed by repeated at-

tempts to prosecute him. A defendant who has pleaded guilty is in the same position as one who has been convicted by verdict of jury.*

By pleading guilty, a defendant irrevocably commits himself to his chosen course. He may not withdraw that plea unless he can subsequently prove that his entry of the plea was a result of "force, fraud, fear, ignorance, inadvertence or mistake such as would justify the court in concluding that it ought not be permitted to stand." *Friedman* v. *United States*, 200 F.2d 690, 696 (8th Cir. 1952). Having placed himself in this position, the least he is entitled to is that this disposition of his case be final and that he shall not be "twice vexed for the same cause." **

Guilty pleas play a vital role in the orderly administration of justice. More than 90% of all convictions in the federal courts are by such pleas,† and they should be afforded judicial certainty. In the absence of such treatment, the effectiveness of this technique of disposing of criminal charges will inevitably be impaired.

That courts are without authority to vacate pleas of guilty is clear from the historic treatment of such pleas. In the absence of a statute granting specific authority to refuse a

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* In *Kercheval* v. *United States*, 272 U.S. 220, 223, this Court said: "A plea of guilty differs in purpose and effect from a mere admission or extra-judicial confession; it is itself a conviction." In *United States* v. *Sabourin*, 157 F.2d 820 (2d Cir. 1946), *cert. den.*, 329 U.S. 800, the court quoted the above and added: "Thereupon it becomes the duty of the court to impose sentence." (157 F.2d at 821.)

** "Nemo debet bix vexari pro una et eadem causa." See 65 Yale L.J. 339 nn. 7 and 13 (1956).

† See Annual Report of the Director of the Administrative Office of the United States Courts (1958) at 208. Previous reports contain similar figures. The federal experience is similar to that in state courts. See *Orfield*, "Criminal Procedure from Arrest to Appeal" (1947) at 297-298.

guilty plea, courts are required to accept them. This is a "well-established rule of the common law" (Opinion of Justices, 91 Mass. [9 Allen] 585, 586 (1864)). As stated in Clark's Criminal Procedure (2d ed. Mikell 1918), at 429:

> "In the absence of a statutory provision to the contrary, the defendant may plead guilty in a capital case as well as in any other, and the court must pronounce the proper judgment and sentence, though it may be death. It cannot compel him to plead not guilty, and submit to a trial, . . ."

A fortiori, in the absence of statute, a court has no authority to vacate a guilty plea over the accused's objections. As concisely stated in *People* v. *Freiberg*, 137 Misc. 314, 243 N.Y.S. 590 (1930):

> ". . . this court can find no authority permitting the County Court, on its own motion and without the consent of a defendant, to set aside a plea of guilty."

Certainly if a court cannot refuse to accept a guilty plea, it is not free to vacate the plea once accepted. Otherwise, the requirement that the plea must be accepted would be meaningless.

The rule that, in the absence of statute, a court has no authority to refuse to *accept* a plea of guilty is no longer applicable in the federal courts because there is a "statute" applicable, to wit, Rule 11 of the Federal Rules of Criminal Procedure. Rule 11 states that "The court may refuse to accept a plea of guilty. . . ."* By contrast, no statute or rule has been enacted to change the common law rule that

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* "The original common-law view was . . . contrary [to Federal Rule 11.]; if the defendant persisted, the court had to accept the plea." Puttkamer, "Administration of the Criminal Law," (U. Chi. Press; 1953), at 170, n. 17.

a plea of guilty cannot be *vacated* without the defendant's consent. The withdrawal of guilty pleas is treated only by Rule 32(d), but that Rule is applicable solely to withdrawals voluntarily made by defendants.*

There are valid reasons why the Federal Rules of Criminal Procedure permit federal courts to refuse to accept guilty pleas but fail to permit their vacation over a defendant's objection. As stated earlier, once the plea has been accepted, the defendant has been convicted; his position has radically altered in many ways. Consequently he is entitled to rely with certainty on the fact that he will not be subjected to further prosecution. The same rule would be applicable in a case where, following a conviction by jury of a lesser included offense, the court sought to set aside the verdict so that the Government might bring a new indictment charging a higher offense.**

Just as the defendant must make his choice, so must the court. Having once convicted an individual, by plea or verdict, the court may not undo that act without the consent of the individual. If the court wishes to take advantage of the benefits of a plea of guilty, it must also accept whatever burden is involved. If the only burden is that the court cannot renege on its decision in order that the

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* Rule 32(d) is a restatement of Rule II(4) of the Criminal Appeals Rules of 1933, 292 U.S. 661. The 1933 Rules were drawn pursuant to Act, March 8, 1934, c. 49, 48 Stat. 399, which provided, *inter alia*:

"... That nothing herein contained shall be construed to give the Supreme Court the power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed."

** As a general rule conviction of a lesser included offense bars subsequent trial of the greater offense. American Law Institute, Administration of the Criminal Law: Double Jeopardy, 137-145 (1935).

defendant may be secure in the knowledge that the charges are finally disposed of, then that burden is not a great one.

Precisely this question was decided in *R.* v. *Grant*, [1936] 2 All Eng. Rep. 1156. There, the defendant had offered a plea of guilty and the plea was accepted. The judge subsequently changed his mind and bound the defendant over to another court for trial. The Court of Criminal Appeal held that a plea of *autrefois convict* should have been entered, and discharged the defendant. The court reasoned that the judge should not have permitted the defendant to plead until the judge "had made up his mind" and that, having done so, the judge was without power to alter his decision.

In addition to the above arguments, another reason exists why federal courts do not have the authority to vacate guilty pleas over defendants' objections. Having convicted a defendant once, the court's authority over him with respect to conviction is exhausted. In *Ex parte Lange*, 85 U.S. 163, this Court held that the commencement of punishment exhausts a court's authority to impose further punishment. In that case the trial court had vacated the sentence initially imposed and sought to impose a different one. This Court said, "Not only the gross injustice of such a proceeding, but the inexpediency of placing such a power in the hands of any tribunal is manifest" (85 U.S., at 168).

This Court held that the power of courts to modify their own orders is limited "by the common law, by the Constitution, and by the dearest principles of personal rights, which both of them are supposed to maintain" (85 U.S., at 178). While *Lange* involved a case of double punishment, this Court noted in that decision that the rule prohibiting double punishment also "forbid[s] a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted

or convicted" (85 U.S., at 169). The very principles which preclude a court from modifying an order of sentence without the defendant's consent preclude a court from vacating a conviction without such consent, whether that conviction is obtained by plea or verdict; for in each case, the court's power is exhausted.

In *Lange*, this Court concluded its opinion as follows: "There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied" (85 U.S., at 178). Here, the same concern for personal rights requires that this Court hold that the court's authority over petitioner with respect to conviction was exhausted once his plea of guilty had been accepted.

Finally, if the courts may properly be afforded the power, in some circumstances, to vacate pleas over a defendant's objection, then that power must be granted in the same manner the courts were given the power to refuse to accept such pleas—by act of Congress or, equivalently, by amendment of the Federal Rules of Criminal Procedure. In our view, however, the grant of such power would be undesirable.

B. In Any Event, the Court Abused Its Discretion in Vacating Petitioner's Plea of Guilty.

As shown above, the trial court's action in vacating petitioner's guilty plea and entering a plea of not guilty was wholly beyond the court's authority. However, even assuming that the court has authority to vacate a plea

without a defendant's consent under some circumstances, nevertheless the court's action in the case at bar was an abuse of discretion.

Petitioner's guilty plea was voluntary, with full knowledge of the consequences, and upon advice of counsel (R. 27). Following his plea, the court before which he pleaded announced a sentence of five years. The interests of both petitioner and society at large would have been satisfied by the immediate termination of proceedings and petitioner's incarceration. As stated in *Leonard* v. *United States*, 231 F.2d 588, 590 (5th Cir. 1956):

> " . . . There is, of course, an important place in the administration of criminal justice for the guilty plea. There are advantages both to society and to the accused from the willingness of trial courts to accept pleas of guilty when voluntarily and properly made . . . "

This Court also has recognized the policy considerations involved:

> "It hardly occurred to the framers of the original Constitution and of the Bill of Rights that an accused, acting in obedience to the dictates of self-interest or the promptings of conscience, should be prevented from surrendering his liberty by admitting his guilt. The Constitution does not compel an accused who admits his guilt to stand trial against his own wishes. Legislation apart, no social policy calls for the adoption by the courts of an inexorable rule that guilt must be determined only by trial and not by admission . . . " (*Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 276).*

* Compare the statement of Judge Hall in refusing to reconsider his decision vacating the guilty plea: "If this defendant is guilty, he ought to be tried and have a jury determine his guilt" (R. 29).

No federal case has been found in which the court vacated a defendant's plea of guilty over his objections. Accordingly, there is no precedent in federal law setting forth the circumstances under which this may be done. Most of the cases in the state courts do not consider the question of the court's authority and rely instead on the alternate ground of double jeopardy (see subsection D *infra*). However, we believe that if a district court has the authority to vacate guilty pleas under some circumstances, it can only do so in circumstances affecting the fundamental validity or fairness of the offer and acceptance of the plea—such as fraud, fear, ignorance or inadvertence. In *People* v. *Warden of New York City Prison*, 107 N.Y.S. 2d 136 (1951), aff'd 110 N.Y.S. 2d 918 (1952), relator pleaded guilty and was sentenced after promising not to challenge that part of the indictment which charged him as a second offender. He subsequently broke his promise and had the sentence set aside. The County Court vacated relator's guilty plea, over his objection. The appellate court held that relator could not be retried, saying:

> "From these and other authorities it appears that the act of the County Court in this case setting aside the relator's reduced plea was a nullity unless it can be established that fraud or trickery was practiced upon it . . . " (107 N.Y.S. 2d, at 140).

In the case at bar, the only ground given by Judge Hall for his action was that Judge Clarke's acceptance of the guilty plea "Apparently . . . smacks too much of having the appearance of a bargain . . . That if [petitioner] would plead guilty, he would get five years" (R. 24).* The court did not specify the parties to the bargain, the appearance of which it seemed to sense.

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* Judge Hall also mentioned the "interest of justice" (R. 24). This is not a ground, merely a conclusion.

The arrangement between the United States Attorney and indigent petitioner's court-appointed counsel is a common one. The arrangement did not involve any promise or commitment with respect to the length of sentence. It related solely to the acceptance of pleas to a lesser number of counts than the total contained in the indictment and the dismissal of the remaining counts. Such arrangements are favored by "administrative policy" [Note, 64 Yale L.J. 590, 599 (1955)], and are "a practical necessity in criminal administration" [Orfield, "Criminal Procedure from Arrest to Appeal" (1947) 342]. Hence, Judge Hall presumably had in mind a bargain with Judge Clarke.

There was, in fact, no bargain of any sort with Judge Clarke. As counsel informed Judge Hall, Judge Clarke did not in any way indicate the nature of the sentence to any person until he announced the term he had determined in open court, following acceptance of the plea of guilty (R. 23-24, 26-29). There is nothing unusual in the imposition of a five-year sentence for a first offender under the federal narcotics statutes. In view of the above and in the absence of contrary evidence, the court's implications as to a deal or the appearances of a deal were totally unwarranted.*

Judge Hall's vacation of the guilty pleas is contrary to the rule set forth by this Court in *Bute* v. *Illinois*, 333 U.S. 640, 671, that "Doubts should be resolved in favor of the integrity, competence, and proper performance of their official duties by the judge and the state's attorney."

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* Even if there had been an appearance of a bargain with the first judge, the mere *appearance* of a bargain is a collateral matter which does not relate to the fundamental validity or fairness of the conviction. Whatever interests there may be in having courts vacate convictions to defendants' prejudice where there is the mere suspicion of a bargain, such interests must give way to the more important policy that convictions are final and that convicted persons know when their prosecution has terminated.

There was nothing before Judge Hall which even warranted any inference which would tend to rebut this presumption of regularity. Certainly there was nothing before him which did rebut this presumption. Under these circumstances, his vacation of the pleas constituted a clear abuse of discretion.

In addition to the "appearance of a bargain" which the court gave as its reason for vacating petitioner's plea, the court strongly indicated its reliance on additional grounds, clearly inappropriate for the exercise of whatever discretion there may be to vacate a guilty plea. In a colloquy held during the court's explanation of its grounds for vacating the plea, the court noted the number of counts and the total amount of narcotics allegedly involved. This discussion immediately followed a remark by the court concerning the five-year sentence (R. 24; see also R. 29). Judge Hall's remarks (as well as the sentence he later imposed) demonstrate his view that a guilty plea followed by a five-year sentence failed to satisfy the court's individual standards for disposing of the case.

It seems almost unnecessary to state that dissatisfaction with the length of a sentence which the court might feel, under the particular facts, should be imposed following a guilty plea is insufficient reason for vacating that plea and requiring a defendant to undergo a jury trial. In fact, it is difficult to conceive of any reason which would more directly conflict with the rule that a conviction bars additional prosecution and increased punishment.

Numerous cases have held expressly that a defendant's disappointment with length of sentence cannot provide reason for the withdrawal of guilty pleas.* Certainly, if a

* E.g., *Stidham* v. *United States*, 170 F.2d 294, 298 (8th Cir. 1948); *United States* v. *Colonna*, 142 F.2d 210, 213 (3rd Cir. 1944); *Williams* v. *United States*, 192 F.2d 39, 40 (5th Cir. 1951); *United States* v. *Schneer*, 194 F.2d 598, 600 (3rd Cir. 1952).

defendant cannot withdraw a guilty plea because of disappointment with length of sentence, the court should not be permitted to vacate the plea of a person who has been convicted merely because it would prefer, for its own purposes, to impose a longer sentence following a jury trial.*

C. The Procedures Used in Vacating Petitioner's Plea Deprived Petitioner of Due Process of Law.

If this Court should hold that the rights given a defendant by his plea of guilty may be extinguished under certain circumstances, then in any given case this deprivation should be accomplished only by the use of procedures insuring against arbitrary action. Such procedures include the right to examine and cross-examine witnesses and to offer evidence and otherwise to apprise the court of all the facts. *Carter* v. *Kubler*, 320 U.S. 243, 247; *United States* v. *Dillman*, 146 F.2d 572 (5th Cir. 1944).

In the case at bar, a district judge summarily vacated a plea of guilty accepted by another district judge without affording petitioner the above safeguards. In so doing, the second judge made charges which seriously reflect upon the conduct of the other federal judge, an Assistant United States Attorney, and petitioner's court-appointed counsel. Such charges are totally baseless and find no

* *F[illegible]man* v. *United States*, 200 F.2d 690 (8th Cir. 1953) illustrates this parallel. In upholding the trial court's refusal to permit withdrawal of guilty pleas, the court said of the defendants:

> "They were free to let their [not guilty] pleas stand and to have a trial. They were offered the opportunity by the Government to plead guilty to one count of the indictment or to stand trial upon four counts. It is apparent that their [guilty] pleas were voluntarily, understandingly and deliberately entered and that it was only their dissatisfaction with the sentence imposed which caused them to apply for leave to withdraw their [guilty] pleas" (200 F.2d, at 697).

support in the record. They fly in the face of the presumption of regularity which this Court has held must be applied to actions of judges and prosecuting attorneys. See *Bute* v. *Illinois*, 333 U.S. 640, 671, *supra*.

What this Court recently said with respect to another summary proceeding is equally applicable here: "There has not been the 'protection of the individual against arbitrary action' which Mr. Justice Cardozo characterized as the very essence of due process." *Slochower* v. *Board of Higher Education of City of New York*, 350 U.S. 551, 559. In *Slochower* this Court held that a teacher who had claimed the Fifth Amendment before a federal investigating committee could not be summarily discharged from employment by the State of New York. This Court stated that New York must "conform to the requirements of due process" (at p. 556) and itself make a proper inquiry into Slochower's fitness. It held that a presumption of unfitness, based on Slochower's assertion of his Fifth Amendment privilege was unwarranted.

In the present case, Judge Hall drew an unwarranted presumption as to the circumstances surrounding the guilty plea without making an adequate investigation into the facts. Instead, he vacated petitioner's plea and subjected him to the ordeal of trial on the basis of an unfounded and ugly suspicion. A defendant in a criminal case is entitled to the use of fairer procedures than those used here.

Judge Hall's failure to hold a hearing or to examine witnesses was most prejudicial. Had he done so, the testimony of all parties would have established the true facts unequivocally. More important, however, as this Court said in discussing the meaning and extent of constitutional protection against action without due process of law, " . . . it has always been recognized that one who has acquired rights by an administrative or judicial proceed-

ing cannot be deprived of them without notice and an opportunity to be heard" [*Garfield* v. *Goldsby*, 211 U.S. 249, 262]. And, as stated in *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 276, "Procedural devices rooted in history were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of 'life, liberty, or property.'"

D. Regardless of Whether or Not the Vacation of Petitioner's Guilty Plea Was Proper, Petitioner Was Placed in Jeopardy Upon His Guilty Plea and the Subsequent Trial Was Barred.

Assuming *arguendo* that the district court had the power to vacate petitioner's guilty plea and that it did not abuse its discretion in so doing, nonetheless petitioner had been placed over in jeopardy by his guilty plea, and his subsequent trial placed him in double jeopardy in contravention of the Fifth Amendment.

In *Kercheval* v. *United States*, 274 U.S. 220, this Court held that, where a trial court permitted a defendant to withdraw his plea of guilty, proof of that plea was not admissible in a subsequent trial. *Kercheval* described the legal effect of such a plea as follows: "A plea of guilty differs in purpose and effect from a mere admission of guilt or extra-judicial confession; it is itself a conviction" (274 U.S., at 223). As the Court of Appeals for the Second Circuit said, after quoting the above, "Thereupon it becomes the duty of the court to impose sentence." *United States* v. *Sabourin*, 157 F.2d 820, 821 (2d Cir. 1946).

It is true that a defendant may waive the prior jeopardy of a conviction and thereby consent to a subsequent trial.*

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* *Ball* v. *United States*, 163 U.S. 662.

Where he has been convicted by plea, this may be done by making a motion to withdraw that plea under Rule 32(d) of the Federal Rules of Criminal Procedure. Where he has been convicted by trial, he may waive former jeopardy by making a motion for a new trial under Rule 33 or by taking an appeal under Rule 37. However, in the absence of such waiver by the defendant, the jeopardy which attaches to his prior conviction, whether by plea or trial, cannot be removed.

In *Green* v. *United States*, 355 U.S. 184, this Court held that an appeal from conviction of a lesser offense did not waive the jeopardy which had attached to the implied acquittal of the greater offense. In so holding, this Court set forth many of the applicable double jeopardy principles. An analysis of those principles demonstrates that petitioner's trial was barred by the Fifth Amendment to the Constitution.

The *Green* case reaffirms the rule that double jeopardy is applicable to second trials for the same offense, whether the defendant is punished or not and whether the defendant is acquitted or convicted at the first proceeding. The decision further holds that "it is not even essential that a verdict of guilty or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge" (355 U.S., at 188), since jeopardy attaches when the trial commences. Certainly if jeopardy attaches prior to any finding by a jury, it must attach upon a conviction by plea of guilty. A defendant is put in far greater jeopardy by that plea than he is by the mere commencement of a jury trial. One who has pleaded guilty has "run the gantlet" once.

Furthermore, *Green* explains "the underlying idea" of the Constitutional provision regarding double jeopardy as being the protection against "repeated attempts" by the

Government to convict an individual, "thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity" (355 U.S., at 187). These considerations are applicable to further attempts to prosecute a person who has been convicted by plea of guilty just as much as to further attempts to prosecute a person who has been convicted by trial. It is the second proceeding which the Constitution prohibits; it is that proceeding which violates the rights of the defendant; and his rights are violated regardless of which procedure is used in obtaining the first conviction.

If any doubt remains whether jeopardy attaches on a plea of guilty, it is removed by giving to the Constitutional provision the liberal construction which *Green* deemed required: "The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued. If such great Constitutional protections are given a narrow, grudging application they are deprived of much of their significance" (355 U.S., at 198).

The case of *United States* v. *Sabella*, 272 F.2d 206 (2d Cir. 1959), is similar to the instant case. In *Sabella*, the defendants pleaded guilty to a narcotics offense and were sentenced. The defendants then filed writs of habeas corpus seeking to have the sentences set aside on the grounds that they were illegal. The Government agreed and moved for vacation of sentence. The district court vacated the sentence, and also, on its own, set aside the judgment of conviction and dismissed the indictment. When a new indictment was brought, defendants raised former jeopardy as a bar. The court of appeals assumed that, in view of the illegality of the sentence, defendant was not placed in jeopardy by the sentence and the time served thereunder. However, the court held that the previous conviction upon

guilty plea *did* place defendant in jeopardy and thus barred subsequent trial.*

The holding of the *Sabella* case that conviction upon plea of guilty places a defendant in jeopardy has been consistently supported by other courts. E.g., see *R.* v. *Grant*, (1936) 2 All Eng. Rep. 1156; *Markiewicz* v. *Black*, 138 Colo. 128, 330 P.2d 539 (1958); *People* v. *Mims*, 136 Cal. App. 2d 828, 289 P.2d 539 (1955); *United States* v. *Lewis*, 114 F. Supp. 512 (N.D. Tex. 1953); *People* v. *Warden of New York City Prison*, 107 N.Y.S. 2d 136 (1951), aff'd 110 N.Y.S. 2d 918 (1952); *State* v. *Thompson*, 76 N. Dak. 125, 34 N.W. 2d 80 (1948); *Belter* v. *State*, 178 Wis. 57, 189 N.W. 270 (1922); *Boswell* v. *State*, 111 Ind. 47, 11 N.E. 788 (1887); *People* v. *Goldstein*, 32 Cal. 432 (1867).

The fact that a formal judgment of conviction had been entered in *Sabella* and not in the instant case is without significance in determining whether jeopardy has attached. As pointed out by this Court in *Kercheval* v. *United States*, 274 U.S. 220, 223 (1927), it is the plea, not the judgment or sentence, which constitutes the conviction.**

This is in accord with the historic view.† Blackstone says that "the plea of autrefois convict, or a former conviction for the same identical crime, though no judgment was ever given or perhaps ever will be (being suspended by the benefit of clergy or other causes), is a good plea in bar

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* The court so held even though the defendants did not object to the vacation of the original judgment of conviction. The vacation of petitioner's guilty plea, however, was over his vigorous and repeated objections.

** Cf. *Kepner* v. *United States*, 195 U.S. 100, 130 (1904):

"It is, then, the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered, although no judgment be entered on the verdict. . . ."

† E.g., *People* v. *Goldstein*, 32 Cal. 432 (1867); *Boswell* v. *State*, 111 Ind. 47, 11 N.E. 788 (1887).

to an indictment" (4 Commentaries 336).* And, as stated in *Green*, the commentaries "greatly influenced the generation that adopted the Constitution" (355 U.S., at 187).**

That the plea, and not the judgment or sentence, constitutes the conviction, is also the modern view. In *Ruaion* v. *United States*, 274 F.2d 305 (6th Cir. 1959) the defendant had pleaded guilty to an offense in one federal district and his plea had been accepted by the court "but judgment was at that time reserved" (274 F.2d, at 305). Prior to the time any further action was taken upon that plea, he was tried on another indictment in another district. He offered his guilty plea in bar, alleging double jeopardy. The court of appeals rejected the Government's argument that there was no jeopardy until judgment was entered, saying that jeopardy attaches at the time the plea is made.†

Similarly, the American Law Institute, in setting forth the rule that a prosecution resulting in a "conviction" bars another prosecution for the same offense, defines a plea of guilty accepted by the court as such a conviction. The entry of a judgment is considered immaterial, unless the failure to enter judgment was brought about by a motion of the defendant. A.L.I. Model Penal Code, Tentative Draft No. 5 (1956) § 1.09.

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* Cf. I Inst. 390b, 391a:

"The difference between a man attainted and convicted is, that a man is said convict before he hath judgment; as, if a man be convict by confession, verdict, or recreancie, and when he hath judgment upon the verdict . . . he is said to be attaint."

** Cf. *Sabella*:

"Blackstone spoke with preeminent authority to the framers of the Bill of Rights" (272 F.2d, at 209).

† The court, however, upheld the second conviction on the separate ground that the second trial was for a different offense.

Petitioner was placed once in jeopardy by his plea of guilty. Accordingly, his subsequent trial placed him in double jeopardy and thereby violated his constitutional rights.

E. Where the Indictment Charged One Count of Conspiracy and Four Substantive Counts, Comprehending the Overt Acts of Such Conspiracy, the Disposition of the Conspiracy Count and One Substantive Count by Guilty Plea, With the Understanding That the Other Counts Would Be Dismissed, Barred Petitioner's Subsequent Trial on Those Other Counts.

Petitioner's plea of guilty to two of five counts was accepted by the district court on June 26, 1958. The remaining three counts were held for formal dismissal at time of sentencing. When Judge Hall purported to vacate petitioner's pleas on July 29, 1958, he ordered a plea of not guilty entered on all five counts and set all five counts for trial (R. 5; R. 25).

The acceptance of petitioner's guilty plea on counts one and two constituted a disposition of all pending charges. While counts three, four and five, were ordered "held," for all practical purposes this was tantamount to a dismissal. Had petitioner been sentenced on counts one and two, as he should have been, and had the remaining counts been formally dismissed, no further prosecution on counts three, four and five would have been permitted. Even in the absence of a formal dismissal, however, the same rule is applicable.

We have earlier stressed the practical importance of the use of guilty pleas in the orderly administration of criminal

justice. In many cases defendants plead guilty to certain counts, and other pending charges are dropped.*

The resolution of criminal charges by such pre-plea arrangements with the prosecutor has been termed "a practical necessity in criminal administration" ** and is a practice favored by "administrative policy." † Realistically, the use of this procedure requires that no further prosecution be permitted on the dismissed counts, whether on the same indictment or by subsequent indictment. Otherwise, all meaning is removed from the dismissal, and defendants will no longer obtain the advantages previously afforded by a plea to a lesser number of counts. Present guilty plea practices constitute a recognition of the desirability of an expeditious disposal of criminal cases where guilt is admitted and at the same time guarantee

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* "It is generally known that the great bulk of criminal cases are disposed of by pleas of guilty made after some discussion between the defendant and/or his counsel and the prosecuting attorney in which the latter frequently makes some commitment as to the sentence he will recommend or as to other charges or prosecutions he will drop; if this were not so, or if this Court holds that it may not be so, there would be few inducements for any person to plead guilty." Dissenting opinion of Tuttle, J., in *Shelton* v. *United States*, 242 F.2d 101, 115 (5th Cir. 1957), rev'd on reh. en banc 246 F.2d 571, rev'd 356 U.S. 26.

"... Often the defendant pleads guilty to one or more indictments in consideration that the other indictments be dismissed: [citing cases]." Note, 24 J. of Crim. L. & Criminology 600, 601 (1933-34).

"A fourth method of compromise consists in securing either a dismissal or a reduced penalty at the hands of the prosecuting attorney. ..... he may agree to dismiss a number of pending charges if the accused will plead guilty to one ..." Miller, "The Compromise of Criminal Cases," 1 So.Cal.L.Rev. 1, 6 (1927).

** Orfield, "Criminal Procedure from Arrest to Appeal" (1947), at 342.

† Note, 64 Yale L.J. 590, 599 (1955).

that offenders will in each case receive whatever punishment is deemed necessary. But this result cannot be accomplished, unless the defendant is afforded some benefit also. If the benefit is entirely illusory, and may be taken away at the will of the prosecutor or the court, then defendants would have nothing to gain by a guilty plea.

With respect to petitioner, there is even more involved—namely, the good faith of the district court, since petitioner's plea was entered and accepted in the light of the prevailing practice. The Government and court-appointed counsel for the indigent petitioner agreed upon a final disposition of the case by a plea of guilty on two counts and dismissal of the others. The court approved this disposition of the case and accepted the guilty plea on this basis. No further trial was contemplated.* Under these circumstances, subsequent prosecution of petitioner on counts three, four and five offends fundamental concepts of justice.**

That no formal entry of a dismissal was made as to counts three, four and five is immaterial. As a matter of course, the counts which the court will dismiss are "held" until the formal order is entered at the time of judgment and sentence. Petitioner's part of the pre-plea arrangement with the prosecutor was performed in full, and the court

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* This is unequivocally shown by the following colloquy about petitioner on July 26, 1958 among Judge Hall, Assistant United States Attorney Sheridan, and the clerk:

"Mr. Sheridan: There is a co-defendant in this case, your Honor. I don't know if you wish to dispose of that matter now. He is present.

"The Court: Is it just set for trial as to him, too?

"Mr. Sheridan: No, he entered a plea before Judge Clarke, your Honor.

"The Clerk: He is here for sentence, your Honor" (R. 23).

** See *Frankel* v. *United States*, 131 F.2d 756 (6th Cir. 1942), discussed in subsection G, *infra*.

agreed to the dismissal of the remaining counts. All that remained was the formal, ministerial act of entering the judgment.* For the purposes of this case, those counts should be treated as having been dismissed.

While acceptance of the above arguments would avoid the necessity for considering the constitutional questions involved, petitioner urges that, in any event, the double jeopardy clause barred his subsequent trial on counts three, four and five. We believe that under the circumstances of this case the double jeopardy clause bars separate prosecution of petitioner on some counts contained in the indictment after his guilty plea had been accepted on other counts. Even though certain acts may constitute separate crimes for the purpose of a single prosecution and even though separate punishments may be imposed for such acts following a single trial,** double jeopardy will attach if the Government seeks to obtain convictions for such acts at two separate proceedings. *United States* v. *Sabella*, 272 F.2d 206 (2d Cir. 1959), *supra*. In *Sabella*, Judge Friendly, speaking for the court, noted that the single indictment and successive prosecution problems "differ both historically and practically" (272 F.2d, at 211). Among the reasons given are "the ordeal" of a second prosecution. Therefore, the court held that a second prosecution for a related narcotics offense was barred by a prior conviction, even though the same related offense could properly have been tried and separately punished at the time the prior conviction was obtained.

This Court has never decided what tests should be applied to successive prosecutions in the federal courts for

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* Cf. *United States* v. *Sanges*, 144 U.S. 310; *United States* v. *Ball*, 163 U.S. 662; *Kepner* v. *United States*, 195 U.S. 100.

** Cf. *Blockburger* v. *United States*, 284 U.S. 299; *Gore* v. *United States*, 357 U.S. 386; and *Harris* v. *United States*, 359 U.S. 19.

related offenses. We believe that double jeopardy bars successive prosecutions for a series of acts motivated by a common purpose or plan which results in the repeated commission of the same offense. This is the rule set forth by the American Law Institute* and approved by legal writers.** At least to the extent that the prosecution is aware of a series of similar related offenses which involve testimony by the same witnesses, a defendant is entitled to face the charges at a single trial. In the absence of such a rule, an alleged narcotics violator charged with five separate sales, could be forced to face fifteen separate prosecutions in the federal courts alone.† The opportunities for compelling innocent persons to plead guilty to avoid such harassment are obvious. As the Fifth Amendment offers protection against the embarrassment, expense and ordeals of repeated trials as well as successive punishment,†† the adoption of the suggested rule is clearly necessary.†††

The Solicitor General has recognized the necessity for adoption of the policy urged above. In *Petite* v. *United States*, 361 U.S. 529, the Solicitor General moved to vacate a judgment of conviction with directions to dismiss the indictment, and this Court, with Petite's consent, granted

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* A.L.I. Model Penal Code, Tentative Draft No. 5 (1956) § 1.08(2).

** 11 Stanford Law Review "The Protection From Multiple Trials," 735, 753 (1959). Cf. Comment, 65 Yale Law Journal 339 (1956).

† Separate crimes under 21 U.S.C. § 174, 26 U.S.C. 4704(a) and 26 U.S.C. 4705(a) may be involved in each sale. *Gore* v. *United States*, 357 U.S. 386 (1959).

†† *Green* v. *United States*, 355 U.S. 184, 187.

††† See Separate Opinion of Mr. Justice Brennan in *Abbate* v. *United States*, 359 U.S. 187, 196.

the motion. In *Petite*, the defendant pleaded *nolo contendere* to a conspiracy charge involving perjurious conduct. Thereafter he was indicted and convicted for suborning perjury on the basis of certain acts which "had been relied upon" in the earlier conspiracy indictment. The Solicitor General's motion was based "on the ground that it is the policy of the Federal Government 'that several offenses arising out of a single transaction should be alleged *and tried* together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement'" (361 U.S., at 530; emphasis added).

Comparing the facts of *Petite* with those of the instant case, it is seen that the issues are identical. Petite and petitioner both pleaded to a conspiracy count. Both were subsequently tried for substantive counts comprehended by the conspiracy count.* In *Petite* the overt acts occurred over a four-month period; in the instant case they occurred over a six-week period. In each case, the "transaction" involved several separate substantive offenses occurring at different localities, though the *Petite* offenses involved the acts of several different persons in two different states, while the instant case involves the acts of the same persons in the same city. Under the *Petite* rule, petitioner, after his plea, could not have been subsequently indicted for the overt acts on which he was tried. Since that plea constituted a conviction, he also could not be further prosecuted, even under the same indictment; for,

* The deliveries of narcotics involved in counts two, three and five of the indictment herein are specified as the overt acts to effect the conspiracy alleged in count one. The delivery on May 13, 1958 alleged by count four was clearly within the conspiracy from April 28, 1958 to June 11, 1958 comprehended by count one, and apparently the failure to specify it among the overt acts listed in count one was inadvertent.

as the Solicitor General acknowledged, the several offenses must be "alleged and tried together" (361 U.S., at 530). Therefore, if, as we believe this Court will hold, petitioner's duly accepted plea of guilty on counts one and two constitute a conviction, this plea barred any further trial on counts three, four and five.*

In *Petite*, Mr. Justice Brennan, joined by Mr. Justice Black and Mr. Justice Douglas, stated that the judgment should be reversed on the merits for the reason that "the Double Jeopardy Clause of the Fifth Amendment was an insurmountable barrier to the second prosecution." ** Petitioner's trial, after his conviction by plea of guilty, squarely raises this question again. One of the purposes of the double jeopardy rule is to protect defendants against harassment by successive trials. This purpose is vitiated if successive trials are permitted for various offenses arising out of a single act or series of related acts. Almost every criminal act involves the violation of several statutes, either by the commission of the act itself or as an incident thereto. Unless the proposed rule is adopted by this Court, the government will remain free to make repeated attempts to convict a defendant. Under these circumstances "double jeopardy" would become a meaningless phrase.

If the Government is barred from subjecting a defendant to successive trials for acts which must be joined at one proceeding, this rule would bar a trial on such acts following acceptance of a guilty plea as well as following a trial. The principles involved are identical. In the plea case,

* Even if a trial on counts three, four and five could under some circumstances be proper, petitioner's trial on those counts was unlawful because of their joinder with counts one and two on which he had already been convicted by his guilty plea.

** The Court disposed of the matter upon the Solicitor General's motion without reaching this issue.

however, there is an additional reason for prohibiting additional trials. The defendant has made his choice and subjected himself to conviction with the understanding that he has thereby disposed of all charges. To permit the Government subsequently to bring additional charges arising out of these acts would be to deprive him of the very benefits he has obtained by pleading guilty. This is so whether the additional charges are brought by way of new indictment or as a result of the failure to enter the order of dismissal as to those counts which all parties agreed would be dismissed. In either case the defendant is vexed by that harassment which is prohibited by the Constitution.

F. Petitioner Was Prejudiced by the Subsequent Trial and Sentence.

While it is unnecessary to show specific prejudice arising from the deprivation of a constitutional right, in this case the prejudice to petitioner arising from the act of bringing him to trial after his conviction by plea is apparent. He is now imprisoned for twenty years instead of for the five-year term which would have been imposed but for the occurrences previously related. Even assuming *arguendo* that the court might properly have imposed a sentence in excess of five years in this case if it had not vacated the plea, serious injury still exists as a result of the vacation. The mere holding of a trial on charges upon which a defendant has previously been convicted or acquitted subjects him to embarrassment, ordeal and expense and violates his basic rights.

Furthermore, it is a well-documented fact that conviction after a plea of not guilty customarily results in the imposition of a harsher sentence than is imposed following a plea of guilty. See Comment, 66 Yale L.J. 204 (1956):

Newman, "Pleading Guilty for Considerations: A Study of Bargain Justice," 26 J. Crim. Law 780 (1956); Hall, "Law, Theft and Society" (1935) at 143. This is expressly recognized in the model form of Petition to Enter Plea of Guilty, 20 F.R.D. 231, at 291, composed by Judge Mathes of the district court here involved and extensively used in that district:

> ". . . I respectfully request that the court consider in mitigation of punishment at the time of sentence the fact that by voluntarily pleading 'GUILTY' I have saved the Government and the court the expense and inconvenience of a trial. . . ."

Accordingly, the imposition of sentence after trial, as well as the trial itself, prejudiced petitioner in this case.

G. Fundamental Fairness and the Orderly Administration of the Criminal Law Prohibit Imposition of Any Sentence in Excess of Five Years.

Judge Clarke on June 26, 1958 clearly announced, more than once, that a five-year term would constitute petitioner's punishment. In objecting to immediate formalization of that sentence, the Assistant United States Attorney expressly stated that he did not object to the five-year term. The Court then stated that it was definitely committed to the five-year term—and petitioner had every reason to believe that such was his sentence.*

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* Judge Clarke said, referring to his earlier statement as to the length of sentence made following acceptance of the guilty plea:

> "Well, I will keep my word and I will make it five years on each count, to run concurrently on the 21st, and we will have him here on the 21st . . ."
>
> "I will keep my word with you at that time. It will be five years on each count, to run concurrently" (R. 17).

In *Frankel* v. *United States*, 131 F.2d 756 (6th Cir. 1942) the court considered the question whether the statements "I am indicating a fine of $1500" and "The Court indicates a $1500 fine" constituted imposition of a sentence. The court held that, under the circumstances of the case, they did, saying that there was nothing "tentative" or "exploratory" about the trial judge's announcement. In the present case, there was nothing "tentative" or "exploratory" either. The completion of sentencing formalities was delayed, but the sentence itself was announced. Petitioner then was remanded to custody, held in jail, and sentenced two months later to a sentence four times as long. Under these circumstances, we urge that the announced five-year sentence was increased unlawfully.

First, we believe that under the Fifth Amendment a sentence may not be increased under such circumstances. *Ex parte Lange*, 85 U.S. 163 holds that the Fifth Amendment bars an increase in sentence after a defendant has commenced service of the term imposed. We believe that this rule should be applied in cases such as the case at bar, where petitioner was held in jail for two months, and prevented from commencing service of sentence solely for the convenience of the Government.

Second, aside from any constitutional considerations, fundamental fairness and the orderly administration of justice require that good faith be observed by the courts of the United States. In *Frankel*, the court relied on this principle as an alternative ground for vacating the increased sentence imposed by the trial judge after he had earlier announced his intention of imposing the lesser punishment. In so doing the court said:

> "Respect for and confidence in the judicial process would seem to demand that a court keep faith even with

the most venial of those subject to its decrees" (131 F.2d, at 758).

Here, too, an increased sentence after an announcement of a lesser penalty calls for the application of this principle. In the instant case, the announcement was followed by the court's repeated assurance that its word would be kept. The word of the district court should be enforced by this Court under its supervisory jurisdiction over the administration of criminal justice in the federal courts. As was said in *McNabb* v. *United States*, 318 U.S. 332, 340, this Court's duty is to establish and maintain "civilized standards of procedure and evidence." The treatment of petitioner falls far short of that standard.

III.

Petitioner Was Deprived of a Fair Opportunity to Determine and Test Vital Evidence Within the Knowledge of the Confidential Informer.

This Court has recognized the importance of a defendant's right to determine and test evidence within the knowledge of a confidential informer, particularly in entrapment cases. *Roviaro* v. *United States*, 353 U.S. 53. However, the existence of that right is of little consequence unless a defendant is given a fair opportunity to exercise it. There are various ways in which this opportunity may be denied. In *Roviaro*, the Government refused to disclose the name of the confidential informer. In *People* v. *Kilhoa*, 53 Cal. 2d 748, 349 P.2d 573 (1960), the state delayed prosecution until the informer had left the jurisdiction.* In the

* The California Supreme Court reversed the conviction on this ground, holding that the defendant had been denied due process of law and deprived of a fair trial.

case at bar petitioner's opportunity to determine and test the knowledge of the informer was likewise denied, but by more subtle means.

In the instant case, entrapment was the only proper issue for the jury. The facts material to that defense were those relating to the initial meeting between petitioner, government agent Licuanan, and confidential informer Singh. This was the initial contact between petitioner and the Government. Confidential informer Singh bore a note from petitioner's cousin, who was then in jail, asking for assistance and advising that Singh would help raise money for bail by selling narcotics. As a result of that meeting petitioner sold narcotics to Licuanan. Not only did Singh confer alone with petitioner immediately prior to petitioner's first contact with Licuanan (R. 79), but also Singh was the only person who heard the conversation between petitioner and Licuanan (R. 32; R. 83-84). It was this conversation which constituted petitioner's chief evidence that there had been entrapment and which also constituted the Government's chief evidence that there was no entrapment. The facts about this conversation were vehemently contested (e.g., compare R. 49 with R. 95-97).

Thus, the evidence relating to the defense of entrapment was solely within the knowledge of petitioner, agent Licuanan and the informer, Singh. Licuanan testified on behalf of the Government that there had been no entrapment. The Government did not call Singh as a witness.

The above facts are strikingly similar to those in *Roviaro*. There, too, a confidential informer "helped to set up the criminal occurrence and had played a prominent part in it"; there, too, the confidential informer's "testimony might have disclosed an entrapment"; there, too, the confidential informer was the defendant's "one material witness" (aside

from himself); there, too, the opportunity to cross-examine the federal narcotics agent was "hardly a substitute" (353 U.S., at 64). In *Roviaro* the Government refused to disclose the confidential informer's identity. In the case at bar, while his identity was disclosed, petitioner was deprived of a fair opportunity to determine and test the evidence within his knowledge.

Petitioner was advised of the name of the confidential informer for the first time on the same day petitioner was required to call him as a witness. After being counseled by the Assistant United States Attorney, the confidential informer refused to discuss the case with petitioner's counsel. Despite the fact that Singh was produced and advised by the Assistant United States Attorney, the court refused to permit petitioner to treat him as a hostile witness, refused to permit petitioner to explore thoroughly his relationship with the Government, and generally refused petitioner an effective examination of Singh. Under the circumstances, petitioner was deprived of due process of law.

The Government specifically advised Singh that he need not discuss the case with petitioner's counsel (R. 84-85). Apparently, such counseling was at the instigation of the Government and not at the request of Singh.* The Government's counseling of Singh in this regard was directly contrary to the policy announced in *Roviaro*. As stated therein:

> "The desirability of calling John Doe as a witness, or at least interviewing him in preparation for the trial, was a matter for the accused rather than the Government to decide" (353 U.S., at 64).

* Mr. Singh testified: "Well, they asked me—that you might want to talk to me, and that it was up to me to discuss the case with you, if I wanted to or not" (R. 85).

Such counseling is also directly contrary to the policy, set forth by Judge Colley and adopted by this Court, that "The State has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons." *Gordon v. United States*, 344 U.S. 414, 419.

The practice of silencing witnesses is not uncommon.* However, this practice is indefensible.** Singh was admittedly a recent user of narcotics (R. 83), an offense for which he had not been prosecuted (R. 86). Under these circumstances the Assistant United States Attorney's "advice" was an effective means of silencing Singh (R. 85).† By so prejudicing petitioner's case, the Government seriously contributed to the deprivation of due process of law herein involved.

As a result of the Government's actions the only method of obtaining the necessary information was for petitioner to compel Singh to take the stand. Singh's testimony was

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* See *Goldstein*, "The State and the Accused: Balance of Advantage in Criminal Procedure", 69 Yale L.J. 1149, 1168 (1960): "If the defendant should wish to use his own resources in searching out those witnesses who have spoken to the police, prosecutor, or grand jury, he will, more often than not, find that they have been advised not to discuss their testimony with him."

** See Note, "The Duty of the Prosecutor to Disclose Exculpatory Evidence", 60 Columbia L. Rev. 858, n. 49 (1960): ". . . The prosecutor must refrain from any action that would serve to deprive the defendant of evidence that would be brought out by the appearance of favorable witnesses."

† Cf. *Schindler v. Superior Court*, 161 Cal. App. 2d 513, 520-521, 327 P.2d 68 (1958): ". . . Of course, Diaz did not have to obey the orders of the sheriff but as a practical matter such an order can be, and was here shown to be, an effective way of keeping a witness's mouth closed. Since the order came from a person connected with the state, we are of the opinion that a court can and should order that person to cease interfering with defense counsel's right to interview a witness."

essential to the full presentation of the facts involved. Having been compelled to call Singh without any opportunity to discuss the case with him prior to the time he took the stand (R. 85), petitioner should have been allowed to treat him as a hostile witness *ab initio*.* At the very least, petitioner should have been allowed to attempt to show bias and to fully explore Singh's relationship with the Government.**

Petitioner's attempt to examine Singh as a hostile witness was denied by the trial court on the ground that hostility of the witness could not be determined until he had answered questions relating to facts at issue in a manner which demonstrated his hostility to petitioner (R. 76-79). Such questions need not be asked; hostility may be presumed.*** In the case at bar the Government had advised the court that the witness was its "special employee" (R. 46). This in itself established the witness' adverse interest. Similarly, the Government several times described Singh as a "confidential informant" (e.g., R. 43). Further, at one point the Government stated that disclosure to petitioner of Singh's identity might subject him to the possibility of injury or harm (R. 43). Under these circumstances, Singh's role was clear—he was a hostile witness.†

* Cf. *Sorrells* v. *United States*, 287 U.S. 435, 451, where this Court said with regard to entrapment prosecutions: "The Government in such a case is in no position to object to evidence of the activities of its representatives in relation to the accused. . . ."

** Cf. *Union Pacific Railroad Company* v. *Ward*, 230 F.2d 287, 296 (10th Cir. 1956); *Maryland Casualty Company* v. *Kador*, 225 F.2d 120, 123 (8th Cir. 1955); *United States* v. *Vayle*, 175 F.2d 110, 112 (9th Cir. 1949).

*** 3 Wigmore on Evidence (3d ed. 1940) 132, n. 1: "The bias of the witness may be *presumed* from his situation as to interest or relationship, before it is disclosed in his testimony; 1824, *Clarke* v. *Saffery*, Ry. & Mov. 126, Best, C.J. (one creditor of a bankrupt against another)". The *Clarke* case is cited as authority in *St. Clair* v. *United States*, 154 U.S. 134, 150.

† Cf. *Sorrells* v. *United States*, 287 U.S. 435, 451, where this Court said with regard to entrapment prosecutions: "The Government in such a case is in no position to object to evidence of the activities of its representatives in relation to the accused. . . ."

Moreover, the court not only improperly precluded petitioner from treating Singh as a hostile witness *ab initio*, but it also sustained an objection to the line of questioning designed to show that hostility (R. 76-77).

The net result of the rulings as to hostility was to deny petitioner effective examination of a most material witness. An illustration of the extent to which this occurred is the fact that petitioner was never even able to determine Singh's relationship with the Government (R. 81).

During his examination of Singh, petitioner sought to question Singh as to whether or not he had been arrested in the last six months for narcotics violation. To this, the court incorrectly sustained an objection (R. 85). Subsequently, petitioner sought Singh's record of narcotics convictions, but was improperly limited to the question of felonious convictions (R. 86).

It is true that an impeachment of a witness by an attack on his moral character may usually not be done by reference to mere arrests and non-felonious convictions. Here, however, the impeachment of Singh was to be done by showing his bias, since it is common knowledge that informants are often persons subject to the threat of prosecution.*

In *Alford* v. *United States*, 282 U.S. 687, the trial court refused to allow defendant to bring out the fact that the prosecution witness was being held in federal custody. This Court held this to be reversible error, saying:

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* See Donnelly, "Judicial Control of Informants", 60 Yale L.J. 1091, 1092 (1951).

Cf. *Dist. of Columbia* v. *Clawans*, 300 U.S. 617, 630-631 ". . . Common experience teaches us that the testimony of [private police], especially when uncorroborated, is open to the suspicion of bias, . . ."

"The purpose obviously was not, as the trial court seemed to think, to discredit the witness by showing that he was charged with crime, but to show by such facts as proper cross-examination might develop that his testimony was biased because given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution. [Citing authority.] Nor is it material, as the court of appeals said, whether the witness was in custody because of his participation in the transactions for which petitioner was indicted. Even if the witness were charged with some other offense by the prosecuting authorities, petitioner was entitled to show by cross-examination that his testimony was affected by fear or favor growing out of his detention. [Citing authority.]" (282 U.S., at 693)

Numerous other cases have held it improper to preclude inquiries as to whether a prosecution witness might benefit from his testimony by being treated lightly in pending proceedings.* Where the defendant is required to call a confidential informer in order to sustain the defense of entrapment, the same rule should be applied.

The trial court sustained various other objections to the examination of Singh and Lieuanan which it should not have sustained. Thus, the court (1) held irrelevant and immaterial the question of Lieuanan's and Singh's previous transactions together (R. 54); (2) held that a foundation was required for examination of Singh's arm (such examination was intended to demonstrate Singh's current use

* E.g., see *Gordon* v. *United States*, 344 U.S. 414, 421; *United States* v. *Hogan*, 232 F.2d 965, 967 (3d Cir. 1956); *Sandroff* v. *United States*, 158 F.2d 623, 628 (6th Cir. 1946).

of narcotics,* since Singh had testified that he had previously used such drugs but had ceased their use three or four months previously) (R. 81-83); and (3) sustained objections to the following questions propounded by petitioner to Singh:

(a) "Are you an employee of the United States government?" (Objected to as leading and calling for a conclusion (R. 81).)

(b) "Will you describe for the jury your present relations with the United States government?" (Objected to as too remote (R. 81).)

(c) "Are you presently engaged in narcotic activity on behalf of the United States government?" (Objected to as argumentative, irrelevant and immaterial (R. 81).)

Petitioner was materially prejudiced by the limitation of his examination of Singh. Only through effective cross-examination could he have had a fair opportunity to extract from Singh facts which would be contrary to the Government's interest. Further, once Singh testified adversely it was imperative that petitioner be allowed to demonstrate Singh's bias, particularly since petitioner had called Singh as a witness and the jury would be likely to give this fact certain significance. Since agent Lienanan's testimony and petitioner's were directly contrary, Singh's testimony was crucial to the entrapment defense. Under these circumstances if the trial court's rulings were, as we believe, in error, they are clearly errors requiring reversal.

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* See *Fletcher* v. *United States*, 158 F.2d 321, 322 (D.C. Cir. 1946): ". . . the well recognized fact that a drug addict is inherently a perjurer where his own interests are concerned. . . ."

IV.

The Throwing of Narcotics by Petitioner Toward the Arresting Officer, Following Petitioner's Gunpoint Arrest, Did Not Constitute a "Sale" Within the Meaning of 21 U.S.C. § 174.

While Section 174 of Title 21, U.S.C., proscribes many acts, the fifth count of the indictment against petitioner charges only the act of sale and facilitation of the sale of a specific parcel of narcotics to Licuanan and Segura on May 21, 1958 (R. 3). With respect to that fifth count, under which petitioner received ten of his twenty-year sentence,* petitioner contends that he was not convicted of the crime for which he was indicted and tried—to wit, selling**—but rather that he was convicted for his act of *almost* selling.

At the trial, the Government's witnesses Licuanan and Peterson each testified that Licuanan placed petitioner under arrest while petitioner still had possession of the narcotic drug and before petitioner made any attempt to transfer the drug to anyone (R. 42-43; 64-65).† This tes-

* The sentence on count five is not concurrent with the sentence on any other count.

** The facilitation charge was removed from the case by the district court at the time it denied the government's request for an instruction defining the word "facilities" (R. 73).

† Agent Peterson testified, ". . . after Agent Licuanan pulled his gun, [petitioner] threw this bag at Agent Licuanan and ran . . ." (R. 64-65).

Agent Licuanan testified, ". . . I then ran towards the car and I placed Saldana . . . under arrest. Then Saldana threw the paper bag to me and started running" (R. 42).

In addition, the following colloquy occurred between Licuanan and the court:

"The Court: Who threw the bag?
The Witness: Defendant Saldana.
The Court: Threw it on the ground, or the street?
The Witness: No, he threw it at me.

(footnote continued on next page)

timony was given support both by prosecution witness Segura (R. 71) and by petitioner (R. 98). This testimony was not contradicted in any way nor was there any testimony that any money or other consideration had passed from Licuanan or anyone else to petitioner.

The word "sale" is used in narcotic statutes in its ordinary and popular sense. *Affronti* v. *United States*, 145 F.2d 3 (8th Cir. 1944). In the ordinary and popular sense, a sale is the transfer of the property in goods in exchange for money. *Ratigan* v. *United States*, 88 F.2d 919 (9th Cir. 1936), *cert. den.*, 301 U.S. 705, *reh. den.*, 302 U.S. 774. Without such transfer of the property, there might be an attempted sale of contraband (e.g., *State* v. *Fields*, 115 Kans. 489, 223 Pac. 285 (1924)) or an executory contract of sale (e.g., *Fox* v. *United States*, 34 F.2d 99 (4th Cir. 1929); *Filiatreau* v. *United States*, 14 F.2d 659 (6th Cir. 1926)), but there can be no sale. In the instant case, there was no transfer of the property in the narcotics involved in count five.

The Court of Appeals recognized that there had been no transfer of the property and no sale as alleged in count five as of the time that the government agent (Licuanan) pulled his gun and told petitioner he was under arrest. However, a majority of the Court of Appeals held that a sale might have been consummated by petitioner's throwing of the bag containing the narcotics at Licuanan immediately thereafter.

This holding is incorrect in several particulars. The majority view is that the question of whether petitioner intended to complete delivery of the narcotics by throwing

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The Court: Oh he threw it at you?
The Witness: Yes, sir, and it fell on my feet.
The Court: That was after you told him he was under arrest?
The Witness: That's right, sir" (R. 43).

them cannot be determined as a matter of law since the question involves petitioner's state of mind. By contrast, the dissenting Judge correctly concluded that the fact that state of mind is involved does not automatically make the issue one for the jury, that the issue must be taken from the jury if the evidence is inconsistent with the finding of the requisite intention, and that the hypothesis that petitioner was intending to complete a sale was totally inconsistent with the uncontroverted facts.*

Further, the opinion of the majority below ignores the fact that the entire course of conduct between petitioner and Licuanan, theretofore a complete stranger to petitioner, contemplated a cash sale—i.e., one where payment of the purchase price is a condition to the passing of the property in the goods. All the evidence in this regard shows that a cash sale was contemplated and that there was no extending of credit. As testified to by the Government's witnesses, the course of conduct was that immediately upon petitioner's delivery of the packages containing the narcotics to Licuanan and the verification of the contents by Licuanan, Licuanan would pay to petitioner in cash the agreed-upon sum (R. 33; 36; 38-39). No evidence to the contrary on which the jury could find an extension of credit or anything other than a cash sale was ever submitted. Likewise, there was no evidence that any cash had passed from Licuanan to petitioner at the time of the purported delivery on the fifth sale, or at any other time with reference to the fifth sale.

Accordingly, there being no evidence that any cash had passed from Licuanan to petitioner at any time with refer-

* Judge Hamley said, "I do not find a single circumstance surrounding the event which would tend to show that Saldana had a deliberate and voluntary intention of consummating the sale" (R. 10).

ence to the fifth sale, no sale occurred even if it be assumed *arguendo* that delivery took place. In *Marx* v. *United States*, 86 F.2d 245 (8th Cir. 1936), the court reversed a "sale" conviction, notwithstanding delivery of the contraband to the buyer's car as agreed. The court held that a cash sale was involved, that the payment of the purchase price was a condition precedent to the passing of title, that the purchase price had not been paid and hence that the sale had not been completed.

The views expressed by Chief Justice Marshall in *United States* v. *Wiltberger*, 5 Wheat. (18 U.S.), 76, 96, and reaffirmed in *Yates* v. *United States*, 354 U.S. 298, 305, are particularly appropriate in this case:

> "It will be dangerous indeed, to carry the principle that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."

Petitioner did not "sell" the narcotics as charged in count five. Yet the jury was allowed to convict him of this offense.

V.

The Entrapment Instruction Was Erroneous.

While the defense of entrapment is one of man's earliest recorded pleas,* it was not until forty-five years ago, in *Woo Wai* v. *United States*, 223 Fed. 412 (9th Cir. 1915), that a federal court held entrapment to be a valid defense

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* Eve, when accused of eating the forbidden fruit, protested "The serpent beguiled me, and I did eat." Genesis 3:13. The plea was disallowed.

This Court in *Sorrels* v. *United States*, 287 U.S. 435, and more recently, in *Sherman* v. *United States*, 356 U.S. 386, and *Masciale* v. *United States*, 356 U.S. 386, firmly recognized the defense of entrapment and set forth the controlling law.

In the above cases this Court held that the defense of entrapment is an issue for the jury and not for the court. However, this Court has not heretofore set forth any rules regarding the type of instruction to be given the jury with respect to entrapment. In the case at bar the instruction (1) misleads the jury as to the nature of the entrapment defense and (2) improperly allocates the burden of proof.*

The entire entrapment instruction is founded on the proposition explicitly set forth therein, that "the law recognizes two kinds of entrapment, unlawful entrapment and lawful entrapment." In short, the defense which is commonly known as entrapment is denominated in the instruction as "unlawful entrapment." This Court has never used or sanctioned the use of any denomination other than "entrapment."

An instruction which talks in terms of "unlawful entrapment" and "lawful entrapment" can serve only to confuse the jury. Such instruction implies, incorrectly, that there are courses of conduct which constitute entrapment in the legal sense but which are not defenses in a criminal proceeding. Such instruction implies, incorrectly, that the jury is to determine the lawfulness of the conduct of the entrappers. Such instruction places an unwarranted burden on the defendant by compelling a discussion of the facts in the light of an invalid distinction within a classification

* The entrapment instruction (R. 140-141) is set forth verbatim in the Appendix. The given instruction is, and was intended to be (R. 100), substantially the same as one composed by Judge Mathes of this district, and reported at 20 F.R.D. 231, 278-279.

which is in itself unfamiliar and confusing to the jury. This gratuitous addition to the historic definition of the defense of entrapment can serve only to render improbable, if not impossible, proper consideration by the jury. As this Court stated in *Bollenbach* v. *United States*, 326 U.S. 607, 613: "A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

As to the second point of prejudicial error, the instruction on entrapment misleads the jury as to the burden of proof. While the burden of proof is not specifically mentioned in the entrapment instruction, that instruction, in effect, directs the jury to decide the issue merely by balancing the evidence.* The proper rule is that, once inducement by the Government is shown,** the burden is on the Government to prove beyond a reasonable doubt that the inducement was not the cause or creator of the crime. *United States* v. *Masciale*, 236 F.2d 601 (2nd Cir. 1956), aff'd 356

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* ". . . If, then, you the jury should find from the evidence that before anything at all occurred respecting the alleged offense involved in this case, the accused was ready and willing to commit crimes such as those that are charged in the indictment whenever opportunity was offered, and the Government merely offered the opportunity, the accused is not entitled to the defense of unlawful entrapment. If, on the other hand, the jury should find that the accused had no previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the Government, then the prosecution has seduced an innocent person, and the defense of unlawful entrapment is a good defense and the jury should acquit the accused" (R. 141).

** Inducement was present in the instant case. The testimony by the Government's witnesses shows that Lieuanan and Singh, the confidential informer, both previously unknown to petitioner, came to him with a note to petitioner from his cousin (R. 47-48). The note stated that the cousin was in jail and that Singh was going to help raise bail (R. 126). Lieuanan pretended that he was a peddler looking for a source of supply and that he would use some of the profits to help the cousin (R. 47-48). Petitioner testified that initially he refused to attempt to obtain narcotics but was persuaded to do so to help his cousin (R. 91).

U.S. 386; *United States* v. *Silva*, 180 F.2d 557 (S.D.N.Y. 1959).

The entrapment instruction must specifically state the rule re burden of proof. A general instruction re burden of proof elsewhere in the charge is insufficient to advise the jury of the Government's burden re entrapment. *United States* v. *Landry*, 257 F.2d 425 (7th Cir. 1958). This is particularly true where, as here, the entrapment instruction is actually misleading as to the burden of proof.

The vital present-day importance of the defense of entrapment needs no amplification to this Court, and any undermining of the entrapment defense should not be tolerated. Least of all should any undermining be condoned in the charge to the jury, particularly where the only proper issue for the jury is entrapment.

Conclusion

A. Relief With Respect to the First Question Presented (Delay in Sentencing).

Petitioner has been seriously prejudiced as a result of the delay in imposing sentence. We respectfully urge that the dictates of both the Sixth Amendment and Rule 32(a) of the Federal Rules of Criminal Procedure, as well as concern for the orderly administration of the criminal law, require that his conviction be reversed and the indictment dismissed, as to all counts. Further prosecution or the imposition of sentence after such a delay would in our view be unlawful.

Should this Court hold, however, that the unreasonable delay in sentencing petitioner does not warrant dismissal of the indictment, then we urge that petitioner is entitled, at the very least, to be relieved of all prejudice attributable

to that delay.* In such event, petitioner requests that this Court enter an order which would restore petitioner, insofar as possible, to the position he was in at the time formal completion of the five-year sentencing proceedings was improperly postponed on June 26, 1958.

We respectfully suggest that this result could be accomplished by one of two means—(1) by allowing the judgment of conviction on count two to stand and reversing the judgment of conviction on the other counts, or by (2) reversing the entire judgment of conviction and remanding to the district court for sentencing upon the plea of guilty to count two. Petitioner hereby waives** any right to reversal of judgment on count two, unless this Court holds that petitioner is entitled to relief from all punishment and prosecution for offenses covered by the indictment. For the five-year sentence imposed on count two by Judge Hall is the minimum permitted by law (21 U.S.C. §174), and is the same sentence which would have been imposed but for an improper delay. If, however, this Court determines to remand this case to the district court for sentencing, we respectfully urge that it be remanded to District Judge Clarke with directions to impose the five-year sentence previously announced by him. In either event, the district court should be directed to enter a *nunc pro tunc* order making petitioner's sentence effective as of June 26, 1958

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* "American criminal procedure has its defects, though its essentials have behind them the vindication of long history. But all systems of law, however wise, are administered through men and therefore may occasionally disclose the frailties of men. Perfection may not be demanded of law, but the capacity to counteract inevitable, though rare, frailties is the mark of a civilized legal mechanism."

Dissenting opinion of Mr. Justice Frankfurter, *Rosenberg* v. *United States*, 346 U.S. 310.

** Petitioner has expressly authorized counsel, in writing, to make this waiver before this Court.

and to dismiss the indictment as to counts three, four and five.

B. Relief With Respect to the Second Question Presented. (Vacation of Guilty Plea and Subsequent Trial.)

Acceptance of the plea of guilty on counts one and two barred any further prosecution of counts three, four and five. Therefore, we urge that the judgment of conviction as to counts three, four and five be reversed and that this Court direct the district court to dismiss the indictment thereon.

Acceptance of the plea of guilty on counts one and two left the district court with no alternative but to impose sentence. However, that plea has now been vacated by the district court. The vacation of that plea cannot serve to eliminate petitioner's former jeopardy thereon. Having been once in jeopardy, petitioner may not now be required to plead again or submit to any further prosecution.* Accordingly, we urge that the judgment of conviction on count two be reversed and that this Court direct the district court to dismiss the indictment thereon.**

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* Cf. *United States* v. *Sabella*, 272 F.2d 206 (2d Cir. 1959), where the Second Circuit held that former jeopardy remained as a defense in spite of the trial court's vacation of the pleas of guilty which placed the defendant in jeopardy initially.

** Count one has been finally disposed of by virtue of petitioner's acquittal thereon at the close of the prosecution's case in chief. Cf. *Ball* v. *United States*, 163 U.S. 662, 669-670:

"... An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense. (Citing authority.) But although the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error; and, until so avoided, cannot be collaterally impeached. . . . If the judg-

In the event that this Court does not agree that petitioner is now free from the imposition of punishment on count two, then we would under ordinary circumstances request that the judgment be reversed on the post-trial convictions and that the case be remanded for sentence on the guilty plea on count two. However, we believe that requiring the resentencing of petitioner on that count would be a useless act, since he was prejudiced by the trial on that count but not by the length of the sentence imposed thereon. Accordingly, if this Court agrees that the judgment and indictment as to counts three, four and five must be dismissed, but concludes that petitioner may now be sentenced on count two, then petitioner waives any right to reversal on count two and respectfully asks that the sentence previously imposed thereon be permitted to stand.* Petitioner has already served more than two years of the sentence now in effect, the five-year term previously imposed on count two is the minimum sentence permitted by statute, and that sentence was deemed to be the appropriate punishment on count two by both district judges involved.

If, however, this Court determines that, despite petitioner's waiver, a new sentence on count two is required, then we respectfully urge that this case be remanded for such proceedings to the district judge who accepted the plea of guilty** and not to the district judge who purported

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ment is upon an acquittal, the defendant indeed, will not seek to have it reversed; and the government cannot."

While the trial violated Saldana's constitutional rights the court was not without jurisdiction of the cause or the party, and no appeal has been taken from the judgment of acquittal on count one. Accordingly, the acquittal on count one is final.

* Petitioner has expressly authorized counsel, in writing, to make this waiver before this Court.

** As a matter of practice in this district, the judge who takes the plea imposes the sentence. This appears to be the rule gen-

to vacate that plea." We further urge that in view of the announcement by the district court of petitioner's five-year sentence on June 26, 1958, this Court under its supervisory power over the administration of justice direct that the word of the district court be kept, and that a five-year sentence be imposed, effective as of June 26, 1958.

C. Relief With Respect to the Fourth Question Presented. ("Sale" by Throwing Narcotics After Arrest.)

Petitioner's motions for judgment of acquittal made at the conclusion of the prosecution's case in chief and of the trial should have been granted as to this count. The evidence as to this count is undisputed, and all witnesses are in agreement as to the facts. Accordingly, there is no possibility that on retrial a conviction could be obtained. Therefore, the judgment of conviction on count five should be reversed and the district court directed to dismiss the indictment thereon.

D. Relief With Respect to the Third and Fifth Questions Presented. (Trial Errors re Witness Singh and Entrapment Instructions.)

If this Court denies in its entirety the relief heretofore sought, then we urge that the judgment of conviction on

erally. E.g., see *Owens* v. *Hunter*, 160 F.2d 971, 972 (10th Cir. 1948): "... Ordinarily sentence should be imposed by the judge before whom the conviction was had. ..."

* Judge Hall's reason for assuming jurisdiction was that he wished to sentence petitioner because he was scheduled to preside over the trial of petitioner's co-defendant. That co-defendant having fled the country, the reason for Judge Hall's assumption of jurisdiction has disappeared. Furthermore, in view of the record in this case, we believe that, if a new sentence must be imposed, this should be done by some other judge. Cf. *Miller* v. *United States*, 321 U.S. 752.

counts two, three, four and five be reversed on the alternative grounds of (1) deprivation of a fair trial (third question), or (2) erroneous trial instructions (fifth question). Similarly, if this Court orders the district court to dismiss the indictment on count five but denies all other relief heretofore requested, we urge that the judgment of conviction on counts two, three and four be reversed on the above alternative grounds.

Respectfully submitted,

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APPENDIX A

ENTRAPMENT INSTRUCTION GIVEN BY THE DISTRICT COURT

(R. 140-141)

"In this case the defendant has raised the question of entrapment. In that connection, you are instructed that the accused here offers the defense of unlawful entrapment as to each crime charged in the indictment, as to each of the counts. The law recognizes two kinds of entrapment, unlawful entrapment and lawful entrapment. When a person has had no previous intent or purpose to violate the law but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law as a matter of policy forbids conviction in such a case. On the other hand, where a person already has the willingness and readiness to break the law the mere fact that the Government Agent provides what appears to be a favorable opportunity to break the law is no defense, but it is lawful entrapment.

"When, for instance, the Government has reasonable grounds for believing a person has engaged in the illicit sale of narcotics, it is not unlawful entrapment for a Government Agent to pretend to be someone else and to offer either directly or through an informer or other decoy to purchase narcotics from such suspected persons.

"If, then, you the jury should find from the evidence that before anything at all occurred respecting the alleged offense involved in this case, the accused was ready and willing to commit crimes such as those charged in the indictment whenever opportunity was offered, and the Government merely offered the opportunity, the accused is not entitled to the defense of unlawful entrapment. If, on the other hand, the jury should find that the accused had no previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the Government, then the prosecution has seduced an innocent person, and the defense of unlawful entrapment is a good defense and the jury should acquit the accused.

"You must consider the defense of entrapment as to each count of the indictment. It is a question of fact to be de-

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No. 176

In the Supreme Court of the United States

OCTOBER TERM, 1960

LEONARD SALDANA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 176

LEONARD SALDANA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 104–110) is reported at 274 F. 2d 352.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1959, and a petition for rehearing was denied on February 18, 1960 (R. 111). On March 12, 1960, Mr. Justice Douglas extended the time for filing a petition for writ of certiorari to and including April 18, 1960 (R. 112). The petition for a writ of certiorari was filed on April 16, 1960, and was granted on June 27, 1960 (R. 112; 363 U.S. 838). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Upon petitioner's pleas of guilty to the first two counts of an indictment, the district court stated that it would impose the minimum sentence of five years imprisonment. However, the actual imposition of sentence was deferred, and no disposition was made of the three remaining counts, to which petitioner had pleaded not guilty. Subsequently, another district judge, to whom petitioner's case had been assigned for trial, determined that counts 3 to 5 should be tried, and vacated the guilty pleas to counts 1 and 2 in the interests of justice. Petitioner was tried on all five counts, convicted on four of them, and sentenced to 20 years imprisonment. The following questions are presented:

1. Whether the court's acceptance of the guilty pleas to two counts barred petitioner's subsequent trial on the three remaining counts.

2. Whether the second district judge legally vacated the guilty pleas on counts 1 and 2.

3. Whether petitioner was denied a fair trial by certain evidentiary rulings of the court—particularly by the court's refusal to allow petitioner to treat at the outset as a hostile witness a government informant whom petitioner called.

4. Whether the evidence supports the conviction for the sale of narcotics charged in count 5.

5. Whether the instruction to the jury on entrapment was adequate.

STATUTE AND RULES INVOLVED

Section 2(c) of the Narcotic Drugs Import and Export Act, as amended, 70 Stat. 570 (21 U.S.C. 174), provides in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. * * *
>
> Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.
>
> For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954.

Pertinent provisions of the Federal Rules of Criminal Procedure are as follows:

> RULE 11. *Pleas.*
>
> A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere.* The court may refuse to accept a plea of guilty,

and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

RULE 30. *Instructions.*

* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *

RULE 32. (a) *Sentence.*

Sentence shall be imposed without unreasonable delay. * * *

(c) *Presentence Investigation.*

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

(d) *Withdrawal of Plea of Guilty.*

A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

RULE 48. *Dismissal.*

(a) *By Attorney for Government.*

The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of th defendant.

(b) *By Court.*

If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

STATEMENT

1. THE CHARGES AND SENTENCE

The petitioner, Leonard Saldana, and a co-defendant Albert Palomino, were indicted on June 11, 1958, in the Southern District of California in five counts for conspiring to sell and for selling narcotics. Count 1 charged a conspiracy to receive, conceal, sell and facilitate the transportation, concealment and sale of narcotics, in violation of 21 U.S.C. 174, and listed

three overt acts—delivery of heroin on April 28, 1958, May 7, 1958, and May 21, 1958 (R. 1–2). The four other counts charged sales (and facilitating the sales) of heroin on four separate days: one ounce, 423 grains, on April 28, 1958 (count 2, R. 2) one ounce, 32 grains, on May 7, 1958 (count 3, R. 2); one ounce, 7 grains, on May 13, 1958 (count 4, R. 3); and ten ounces, 339 grains, on May 21, 1958 (count 5, R. 3).

At the trial the judge dismissed the conspiracy charge, count 1, for failure of proof (R. 72), and the jury returned a verdict of guilty on the four substantive counts (R. 8, 143). Petitioner was given consecutive sentences of 10 years imprisonment on count 5, 5 years on count 4, and 5 years on count 3, or a total of 20 years. Petitioner was also sentenced to 5 years on count 2 to run concurrently with the sentence on count 3 (R. 8–9).[1]

2. THE ARRAIGNMENT PROCEEDINGS

On June 16, 1958, petitioner appeared without a lawyer before Judge Clarke for arraignment (R. 11–12). Judge Clarke appointed one of petitioner's present counsel (Mr. Reinhardt) to represent him. After his co-defendant pleaded not guilty, petitioner entered a plea of not guilty to all five counts and trial was set for July 15 before Judge Hall (R. 12–13), since

[1] The imposition of sentence on count 2 had been originally suspended (R. 7), but the trial judge corrected the judgment on count 2 by imposing a 5-year sentence, which ran concurrently with that on count 3 (R. 8–9).

Judge Clarke would finish his criminal calendar assignment on June 30 (R. 14).[2]

On June 26, petitioner and his counsel appeared before Judge Clarke and asked leave to withdraw the pleas to counts 1 and 2 and to enter a guilty plea to those counts (R. 15). The court permitted him to do so (R. 15). Petitioner's counsel then stated that since narcotics violations were involved, probation was not authorized, and the minimum sentence was 5 years, petitioner could get no credit until sentenced. To which Judge Clarke replied (R. 16):

> Would you like to have me make it 5 years on each Count and to run concurrently and waive time right now?

Petitioner's counsel replied that he would. Government counsel then stated (R. 16)

> * * * that policywise, where there is another defendant who is going to stand trial, that it is usually advisable to not sentence one defendant first, in that we don't know what his intentions are * * *.

Since the co-defendant's trial was set for July 15, the government suggested petitioner be sentenced on July 21 "in that we never can tell that he is going to appear as a witness" (R. 16). The court then said:

---

[2] As the court of appeals explained the local practice in the district (R. 104), each judge in turn presides over the criminal calendar for three months. The judge so presiding normally receives all pleas, imposes sentences on guilty pleas, and tries short criminal cases. If his calendar does not permit him to hear the longer cases (over four days), he assigns them to other judges.

The COURT: I see. They are afraid that he might get on the stand at the other trial and take all the blame. [R. 16.]

Petitioner's counsel stated it was not correct to have petitioner serve extra time "to insure what his testimony will be at a subsequent trial"; that there was a perjury statute; and that petitioner had told counsel that he did not intend to testify for the co-defendant (R. 16). The court then stated (R. 17):

Well, I will keep my word and I will make it five years on each Count, to run concurrently, on the 21st, * * *

* * * * *

I will keep my word with you at that time. It will be five years on each Count, to run concurrently. That is the minimum. I don't think you can beat that.

Mr. REINHARDT: Thank you.

The CLERK: Do you want a Probation Report then, your Honor?

The COURT: No. There is no use to have a Probation Report, counsel, because of the fact that he can't get probation anyway.

Mr. REINHARDT: Yes; we will waive that.

* * * * *

The CLERK: Just a minute, Mr. Sheridan [Assistant United States Attorney], Mr. Saldana is charged in Counts Three, Four and Five.

Mr. SHERIDAN: Well, hold those.

The COURT: We are going to hold those, hold disposition until July 21 at 2:00 p.m. * * * Yes, we will hold the disposition of the other Counts.

On July 21, petitioner, without his attorney, appeared before Judge Hall, who informed him that his co-defendant's case was set for July 29 and asked petitioner whether he had talked to his lawyer about withdrawing his plea. Petitioner responded by asking for a continuance of a week. Judge Hall continued the matter for one day (R. 18–19). The following day, the government attorney reminded Judge Hall that permission had been given petitioner's counsel not to appear and that the matter would be continued until the co-defendant's trial. Judge Hall stated that the reason for the continuance was to give petitioner an opportunity to consult his lawyer about his plea. The matter of sentencing was set for July 29 (R. 19–20).

On July 29, co-defendant Palomino's attorney informed the court that he was unable to locate his client (R. 21).

Judge Hall next turned to petitioner's case and informed petitioner that he would not sentence him at that time, inquiring whether the matter had been referred to the probation department (R. 23). Petitioner's counsel explained that a guilty plea had been entered before Judge Clarke, who had told petitioner "that he would sentence him to five years" (R. 23). Counsel related that the government objected to petitioner's being sentenced prior to his co-defendant's trial and that Judge Clarke agreed to withhold sentence until after trial (R. 23–24). The court inquired whether the petitioner had pleaded guilty to all five counts and when informed that the

plea of guilty was to two counts, the following colloquy ensued (R. 24):

> The COURT: I think perhaps in the interests of justice I might vacate his plea of guilty to the two counts, enter a plea of not guilty on behalf of the defendant, and set the matter down for trial again.
>
> Mr. REINHARDT: Your Honor, may I suggest again, in the interests of justice, that he did plead guilty before the court, and he was told at that time that the sentence would have been made, but he was held in jail merely for the convenience of the court for another trial, and was told the sentence would be five years.
>
> The COURT: Apparently it smacks too much of having the appearance of a bargain.
>
> Mr. REINHARDT: No, your Honor.
>
> The COURT: That if he would plead guilty, he would get five years.
>
> Mr. REINHARDT: No, your Honor. He pleaded guilty——
>
> The COURT: Here he is charged in five counts.
>
> The CLERK: He pleaded guilty to Counts 1 and 2.
>
> The COURT: But he is charged in all five counts, involving——
>
> Mr. SHERIDAN: A total of about 15 ounces, your Honor.
>
> The COURT: 15 ounces of heroin.
>
> Mr. REINHARDT: Your Honor, if I may just state, there was no bargain. This was done in open court.
>
> The COURT: I didn't say it was a bargain. I said it smacks of the appearance of a bargain.
>
> Mr. REINHARDT: I hope that the appearance will not defeat what appears to me to be the

> interests of justice in this case. I know it is rather unusual that the defendant was told what his sentence would be.

The government agreed that sentence had been delayed for the convenience of the court, and that Judge Clarke had indicated what petitioner's sentence would be (R. 25). The court then ruled (R. 25):

> * * * I think in view of what both counsel have stated, that this defendant here deserves a trial. I will vacate his plea of guilty to Counts 1 and 2, and enter on his behalf a plea of not guilty to all counts of the indictment * * *.

Trial was set for August 5 (R. 25).

On August 1, 1958, petitioner's counsel appeared before Judge Hall on a motion to transfer the matter back to Judge Clarke (R. 26–27, 29). He again stated that "there [was] no deal made in this case" (R. 27), and that sentencing had been postponed over his objection (R. 28). He stated (R. 28):

> However, when he [Judge Clarke] overruled me, he stated in open court he would sentence the defendant to five years when he returned him for sentencing.
>
> That was not the promise of an individual, your Honor, that was the promise of the United States District Court. * * *

Defense counsel stated that he recognized that the court was not bound by another judge's promise which the defendant relied upon, and therefore asked whether the matter could be transferred "back to Judge Clarke, so that the defendant could once more plead before him" (R. 28).

The court stated that it was not bound by Judge Clarke's statement (R. 28–29):

> And I can see no reason for transferring this back to Judge Clarke, because it would be merely in my opinion, confirmation of what appears to have all the earmarks of a deal.
>
> In other words, the defendant is relying upon the fact that Judge Clarke said he was going to give him five years, so he has an understanding on his part that if, as and when, because he pleads guilty, he is going to get five years, which might be another and different sentence than if he were tried and found guilty.

The court denied the motion to transfer back to Judge Clarke (R. 29). Counsel then stated that petitioner would like to plead guilty to counts 1 and 2. The court refused to accept such a plea, stating that 15 ounces of heroin were involved and that "[i]f this defendant is guilty, he ought to be tried and have a jury determine his guilt" (R. 29). At the beginning of the trial, petitioner again stated his objection to the vacating of his plea of guilty (R. 30–31).

3. THE EVIDENCE OF NARCOTIC SALES

The pertinent trial evidence showing the sales of narcotics may be summarized as follows:

(*a*) Jayme R. Licuanan, a Treasury agent assigned to the Federal Bureau of Narcotics, went to petitioner on April 28, 1958, with a special employee, Mr. Roy Singh (R. 31, 33–34, 46).

Mr. Singh had a letter of introduction from Julio Contreras, petitioner's cousin who was in jail (R. 47) (see the letter reproduced at R. 126). The agent

knew when he went to meet petitioner that petitioner had a narcotic conviction and had been involved in narcotics (R. 49, 50, 60). Singh went alone into petitioner's house and later introduced the agent as "Sal" (R. 47, 58). The agent told petitioner that he was a dealer and he would contribute or help raise money for Contreras' bond (R. 58). The agent then asked to be introduced to "Pancho" (R. 58). Petitioner suggested that the agent deal directly with petitioner rather than Pancho (R. 59). Petitioner asked him how much he wanted to pick up at $200 an ounce and the agent said he had $400 or enough for two ounces (R. 32, 59). Petitioner went in his house, made a phone call (R. 51), and told the agent to return at 8:00 o'clock (R. 32, 59). Petitioner told the agent that he had procured 20 ounces the day before (R. 49), and suggested that the agent deal with him (R. 49, 59). That night, petitioner delivered the heroin and was paid $400 (R. 33). Petitioner inquired when the agent would be back and the agent told him he would call him in a day or so (R. 33).

(*b*) On May 6, 1958, the agent called petitioner to pick up a "piece" (one ounce of heroin) the following day (R. 35). The next night, when the agent was at petitioner's home, a 1958 Ford station wagon arrived. Petitioner went out to the Ford and picked up the heroin which he placed on the table. The agent picked it up and paid petitioner $200 (R. 36). Petitioner asked how much more was wanted, saying he could supply "all you want" (R. 36). The agent told petitioner he would call him (R. 36).

(*c*) On May 13, 1958, the agent met petitioner outside petitioner's home and told him he wanted to pick up a "piece" (R. 37). Petitioner went into his home to make a telephone call and then returned and told the agent to drive him to Atlantic and Whittier Streets in East Los Angeles (R. 37). After parking, petitioner motioned to Palomino (the co-defendant) who was on a motorcycle. Palomino stopped, spoke to petitioner, and drove off. Petitioner then directed the agent to another spot where they parked. Palomino returned and handed petitioner the heroin, which petioner gave to the agent for $200 (R. 38–39). Before leaving, petitioner asked the agent when he would be back to pick up some more and the agent said he was tired of picking up the stuff so often, and that next time he would order 5 ounces, to which petitioner replied, "Well that's fine; that would be better" (R. 39).

(*d*) The agent sent petitioner a wire from San Francisco stating he would be in Los Angeles on May 21, 1958 (R. 39–40). He arrived at petitioner's home on May 21 accompanied by Deputy Sheriff Victor Segura (R. 40). Petitioner and Palomino were waiting in the 1958 Ford station wagon (R. 40). The agent told petitioner that Segura was the agent's uncle who had the money, and that they each wanted 5 ounces (R. 40). Petitioner went back to Palomino, and after a short conservation Palomino drove away (R. 40). Later, Palomino returned and the petitioner walked to the car (R. 41). The agent testified as follows (R. 41–42):

> As he got into the passenger side of the station wagon, I seen Saldana [the petitioner] put his hand inside the station wagon, and observed Palomino pick up the brown paper bag and hand it to defendant Saldana.
>
> When I observed this, I believe I asked Saldana if that was the stuff, and he said, "Yes," at which time I then ran towards the car and I placed Saldana and Palomino under arrest.
>
> Then Saldana threw the paper bag to me and started running.[5]

Petitioner escaped but was arrested later (R. 65).

The petitioner took the stand in his own defense and claimed that he agreed to sell only because the men said they would help Julio (Contreras) get out on bail (R. 91). He thought the agent and Singh were dope peddlers—"they having come from this other guy, Julio, who was in jail for dope at the time" (R. 94). On cross-examination petitioner answered as follows (R. 98):

> Q. On how many occasions did you sell narcotics to Agent Licuanan?
>
> A. Four times.

Petitioner later asserted that on the day he was arrested "[t]hat was no sale" (R. 98).

Just prior to the closing arguments, petitioner's counsel moved for a judgment of acquittal "particularly as to Count V, where the evidence does not show there was a sale." This motion was denied (R. 113–114).

---

[5] Deputy Sheriff Segura corroborated the agent's testimony as to the events of May 21 (R. 68–71). Other agents corroborated the testimony about the prior sales (R. 62–68).

In the beginning of the summation before the jury, petitioner's counsel stated (R. 114–115):

> * * * there is only one real issue left in this case. The defendant took the stand and frankly admitted that the sales that were charged were made. The only defense in this case * * * is that the defendant was entrapped into making these sales by the actions of Government agents.

Later in the summation, counsel reiterated (R. 123):

> There were four counts and you will consider four sales of narcotics, and all these sales took place after the Government entrapped the defendant.

The court instructed the jury without objection that one of the elements they had to find was that the defendant in fact "sold or facilitated the sale of the heroin as charged in Counts II, III, IV and V of the indictment" (R. 138). The court also instructed that the presumption in 21 U.S.C. 174—that possession shall be deemed sufficient evidence to authorize conviction—"permits, but does not compel you" to draw the inference that the narcotic drug was illegally imported if possession is proved beyond a reasonable doubt (R. 138–139).

4. DIRECT EXAMINATION OF DEFENSE WITNESS SINGH

After the government had closed its case, petitioner's counsel inquired whether the court would give an instruction on the failure of the government to call an informer. The court indicated that the informer's testimony was not necessary to the government's case and that petitioner had to decide whether his testi-

mony was important on entrapment (R. 73–74). When petitioner's counsel inquired whether, if he called the informer, he would be called as a hostile witness, the court stated that "I don't know whether he will be hostile or whether he won't * * * until he testifies," and that it was for petitioner to decide whether to call him (R. 74–75).

The petitioner called the special government employee (Singh) as the first witness for the defense (R. 76). The direct examination began as follows (R. 76):

> Q. Mr. Singh, have you had any conversation with me prior to this moment?
>
> A. Yes, I did.
>
> Q. Would you tell the jury the nature of that conversation?
>
> Mr. BEVAN: Objected to. I see no relevancy * * *.
>
> The COURT: Objection sustained.

Upon approaching the bench, defense counsel stated (R. 77):

> * * * I would like to make this man a hostile witness, and I would like to show that he refused to discuss the case with me and that, in so doing, he was advised of his rights not to discuss this case with me by the United States Attorney; that he has been in full conference with the Government and the Government's witness since he has been in the courtroom today, and that his entire actions in connection with this case have been at the behest of the Government.

The court advised counsel that "[t]he way to determine whether or not a witness is a hostile witness

is for you to ask him questions. * * * You have got to ask him questions, and then, if he refuses to answer them or if he evades them or shows hostility on the witness stand, this is the test, now, when he is on the stand. It isn't when he is out in the hallway or someplace else" (R. 77).[4] The court further pointed out (R. 78) that the question asked was "what conversations he had with you before court," and that "I can't determine by that whether he is hostile or whether he isn't." The court suggested that defense counsel should "start out and ask him some questions, and if it appears that he is hostile, then I can determine from his attitude now on the witness stand his hostility * * *. Why don't you ask him—* * *—"[i]f he knows the defendant, if he knows Licuanan, if he knows so and so. He may not be hostile. I don't know" (R. 78–79).

Defense counsel then asked—and Singh answered—a number of questions relating to his dealings with petitioner, the advice given him by the United States Attorney with respect to discussing the case with defense counsel, his prior convictions, and his past and present use of narcotics (R. 79–86). The pertinent portions of this testimony are set forth in Appendix B, *infra*, pp. 68–72. The court sustained objections to certain questions as leading, calling for a conclusion, remote, argumentative, irrelevant, or im-

[4] The colloquy between court and counsel over this matter (R. 77–79) is set forth in Appendix A, *infra*, pp. 65–67.

material.[5] The court also refused to permit defense counsel to examine Singh's arm to "determine whether he is presently using narcotic drugs,"[6] on the ground that no foundation therefor had been established (R. 83).

In his summation, petitioner's counsel told the jury that he had called Singh as a witness for the defense because he was the only other party to the conversation (R. 122–125). Counsel further argued that it would be unreasonable to expect Singh to tell the truth (R. 123).

---

[5] The questions, objections and ruling were as follows (R. 81):

"Q. Did you tell the defendant that the reason you wanted to get drugs was in order to raise money to get Julio Contreras out of jail?

"Mr. Bevan: Objected to as leading, your Honor.

"The Court: Sustained.

"Q. Are you an employee of the United States Governmer

"Mr. Bevan: Objected to as calling for a conclusion of the witness, and leading.

"The Court: Sustained.

"Q. Will you describe for the jury your present relations with the United States Government?

"Mr. Bevan: Objected to as too remote, your Honor.

"The Court: Sustained.

"Q. Are you presently engaged in narcotic activity on behalf of the United States Government?

"Mr. Bevan: Objected to as argumentative, irrelevant and immaterial.

"The Court: Objection sustained."

[6] Singh admitted using narcotics in the past, but stated that he had stopped "about three or four months" before (R. 83).

5. THE ENTRAPMENT INSTRUCTION

The court instructed the jury on entrapment as follows[7] (R. 140–141):

> In this case the defendant has raised the question of entrapment. In that connection, you are instructed that the accused here offers the defense of unlawful entrapment as to each crime charged in the indictment, as to each of the counts. The law recognizes two kinds of entrapment, unlawful entrapment and lawful entrapment. When a person has had no previous intent or purpose to violate the law but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law as a matter of policy forbids conviction in such a case. On the other hand, where a person already has the willingness and readiness to break the law the mere fact that the Government agent provides what appears to be a favorable opportunity to break the law is no defense, but it is lawful entrapment.
>
> When, for instance, the Government has reasonable grounds for believing a person is engaged in illicit sale of narcotics, it is not unlawful entrapment for a Government agent to pretend to be someone else and to offer either directly or through an informer or other decoy to purchase narcotics from such suspected persons.
>
> If, then, [redacted] the jury should find from the evidence that before anything at all occurred

[7] A motion for judgment of acquittal by reason of entrapment was denied by the trial judge on the ground it presented a question of fact for the jury. (R. 71–72).

> respecting the alleged offense involved in this case, the accused was ready and willing to commit crimes such as those charged in the indictment whenever opportunity was offered, and the Government merely offered the opportunity, the accused is not entitled to the defense of unlawful entrapment. If, on the other hand, the jury should find that the accused had no previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the Government, then the prosecution has seduced an innocent person, and the defense of unlawful entrapment is a good defense and the jury should acquit the accused.

The court rejected, as covered by its instruction, a proposed instruction on entrapment by petitioner, which read in part as follows (R. 6):

> Entrapment means that the scheme of the crime originated in the mind or minds of the government agent or government informants and that the defendant not having a previous intention to commit offenses of the kind here involved, was induced to engage in the course of such criminal activity by government agents. Entrapment is not established merely by a showing that the government agent asked the defendant to secure narcotic drugs. For if the defendant was willing to commit the offense in any event, then the Government's request cannot be said to be the inducement. But unless the Government has established that the defendant was ready and willing to engage in the traffic charged prior to the request by the Government agent, the defense of entrapment is applicable.

Petitioner's counsel stated (R. 100) that "[a]ctually, your Honor, I don't think my instructions are radically different. * * * I would object particularly to the distinction between lawful entrapment and unlawful entrapment. In my view, entrapment is a legal defense, and there is no such thing as lawful entrapment. If it is entrapment, it is unlawful. And I think that the instruction that I have drawn would avoid that."

6. THE DECISION OF THE COURT OF APPEALS

The court of appeals affirmed the conviction.

(*a*) The court unanimously held that Judge Hall "was legally justified sua sponte under the circumstances of this case" in ordering the withdrawal of the plea of guilty entered before Judge Clark (R. 104). It noted (R. 106):

> Counsel's excellent presentation just overlooks the fact that there was never any plea of guilty or motion to dismiss on counts three, four and five. So the court was justified in going ahead on those counts. Had the court been less abrupt in proceeding, but firm nonetheless, defendant surely would have wanted to withdraw the guilty pleas on the first two counts. The court not being willing to dismiss the last three counts, it would appear that what the court did was eminently fair.

(*b*) The court divided on whether the evidence was sufficient to establish the sale charged in count 5. The majority held that under the evidence, upon which no specific instructions were requested, it was a question of fact for the jury (R. 106). The dissent

thought there was insufficient evidence "which would tend to show that Saldana had a deliberate and voluntary intention of consummating the sale" (R. 110).

(*c*) The court held that all other alleged errors were "without substance" (R. 106).

SUMMARY OF ARGUMENT

I

Wholly apart from whether Judge Hall properly vacated the pleas to guilty to counts 1 and 2, petitioner was properly tried on counts 3, 4, and 5. Since petitioner's sentence is fully supported by his conviction under the latter counts, this Court need not consider whether he was properly tried under counts 1 and 2.

A. On June 29, [redacted] when pleas of guilty to counts 1 and 2 were entered before Judge Clarke, he expressly stated (R. 17) that "we will hold the disposition of the other counts" until July 21st. Thus, when the case came before Judge Hall on July 29, petitioner's not guilty pleas to counts 3 to 5 were still outstanding. In such circumstances, Judge Hall could require petitioner to stand trial on those counts. Under Rule 48(a) of the Federal Rules of Criminal Procedure, neither the government nor a defendant has a right to a dismissal of undisposed counts except "by leave of court," which was not obtained in this case.

B. 1. The trial on counts 3, 4, and 5 was not barred by double jeopardy. Each of these counts charged a separate sale of heroin on a separate day, and thus charged a different offense from the sale charged in count 2. The conspiracy charged in count 1 was a

separate offense from the sales charged in counts 3 to 5. The fact that the conspiracy charge included, as overt acts, the deliveries of heroin involved in some of the substantive selling charges did not bar prosecution for the substantive offenses after a plea of guilty to the conspiracy count.

2. The trial on counts 3, 4, and 5 did not violate the governmental policy involved in *Petite* v. *United States*, 361 U.S. 529, 530, against successive prosecutions for "several offenses arising out of a single transaction." There was here only a single prosecution, not multiple ones, and the different sales did not arise out of a single transaction, but were separate transactions. In any event, the *Petite* policy is merely a guide for the government in instituting criminal proceedings; it cannot invalidate Judge Hall's requiring petitioner to stand trial under counts of an indictment to which he pleaded not guilty.

3. Judge Hall did not abuse his discretion in requiring counts 3, 4, and 5 to be tried. He was not bound to dismiss them because petitioner had previously pleaded guilty to counts 1 and 2, or because Judge Clarke presumably would have dismissed them had he sentenced petitioner under counts 1 and 2. In view of the substantial amount of narcotics involved, Judge Hall could conclude that a jury ought to determine petitioner's guilt.

C. No issue as to the validity of petitioner's trial under counts 1 and 2 remains in the case.

1. Since Judge Hall dismissed count 1 at the close of the government's case for lack of proof, petitioner

suffered no legally cognizable injury from his trial thereunder.

2. Petitioner received a 5-year sentence on count 2 which runs concurrently with a 5-year sentence on count 3. Since the sentence on count 2 thus has no separate legal significance, the Court need not consider its validity.

3. Vacation of the guilty pleas to counts 1 and 2 did not prejudice petitioner in his subsequent trial. In fact, the vacation was to his advantage. Count 1 was ultimately dismissed; and petitioner would have been severely handicapped in defending the sales charged in counts 3, 4, and 5 on the basis of entrapment, without being able to claim that the first sale (count 2) also resulted from entrapment.

4. The Court need not consider whether Judge Clarke's postponement of sentencing following petitioner's guilty pleas to counts 1 and 2 was improper, since those counts are no longer in issue in the case.

II

Although we believe that no issue as to the validity of petitioner's trial under counts 1 and 2 remains in this case, we submit that Judge Hall had legal basis for vacating the guilty pleas to those counts, and for requiring petitioner to stand trial on all the counts on which he had been indicted.

1. Although Judge Clarke stated that he intended to impose the minimum sentence of 5 years' imprisonment on each count to run concurrently, that was not the sentence of the court. Judge Hall concededly was not bound by Judge Clarke's statement of the

intended sentence and, if he had not vacated the guilty pleas to counts 1 and 2, he could have sentenced petitioner to from 5 to 20 years on each count. 21 U.S.C. 174.

Counts 3 to 5 had not been disposed of by Judge Clarke. Petitioner's not guilty pleas to those counts remained standing. In view of the seriousness of the offenses involved, Judge Hall could lawfully conclude that counts 3 to 5 should be tried. The guilty pleas to counts 1 and 2 had been entered on the assumption that petitioner would not be tried, and once Judge Hall decided to try counts 3 to 5, it was "in the interests of justice" (R. 24) that the guilty pleas to the other counts be vacated. As we have indicated, it was plainly to petitioner's advantage not to have his guilty pleas to counts 1 and 2 remain standing if he was to be tried on counts 3 to 5.

2. Judge Hall had the power to vacate the guilty pleas made before Judge Clarke. Rule 11 of the Federal Rules of Criminal Procedure explicitly provides that "[t]he court may refuse to accept a plea of guilty * * *," and the acceptance or rejection of a guilty plea lies in the sound discretion of the court. A corollary of the court's power to reject a plea of guilty is the right to vacate such a plea when required by the "interests of justice." The power to vacate flows from the court's inherent power to control its judgments.

3. Petitioner was not subjected to double jeopardy by his trial under counts 1 and 2 following the vacation of his guilty pleas to those counts. While a

guilty plea may result in jeopardy if it is permitted to stand, it does not have that effect where it has been properly vacated. "[A] trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice" (*Wade* v. *Hunter*, 336 U.S. 684, 689–690). Thus, no jeopardy results from a second trial where the court, over the defendant's objection, properly declares a mistrial at the first trial. The policy considerations upon which this rule is based also support the conclusion that no jeopardy results where, following the vacation of a guilty plea in the interests of justice, the defendant is tried for the offenses to which he had so pleaded.

III

The court's rulings made in connection with petitioner's examination of Singh were proper and did not deny petitioner a fair trial.

1. The petitioner called as a witness one Singh, a special employee of the government, and sought to treat him as a hostile witness at the outset. The court correctly ruled that it could not determine, in advance of his testimony, whether the witness would be hostile, and it properly directed petitioner's counsel to question the witnesses so that his alleged hostility could be determined on the basis of his behavior while testifying.

2. The direct examination did not establish that Singh was hostile. On the contrary, Singh answered all questions without evasion, even though they reflected adversely upon himself.

3. The court properly sustained objections to certain questions as irrelevant, leading, or otherwise objectionable.

IV

The evidence justified the jury in concluding that petitioner had made the sale of narcotics charged in count 5. At the trial, both petitioner and his counsel referred to the transaction as a "sale." The fact that no money passed on the transaction, and that petitioner threw the narcotics at the government agent (the purchaser) instead of turning them over to him, is not inconsistent with the jury finding that a sale was made.

V

The instruction on entrapment was adequate. The court properly distinguished between the situations where the government merely provides the opportunity to commit a crime which the defendant is already predisposed to commit, and where the government itself induces the commission of the offense. The court's description of the former as "lawful," and the latter as "unlawful," entrapment did not confuse the jury. On the contrary, it was a reasonable method of explaining to laymen a legal distinction that may be difficult to comprehend.

ARGUMENT

The fundamental problem in this case, in our view, is quite different from the legal issues which petitioner raises. As the court below held, and as we discuss *infra*, we think that the legal rulings in this case were correct. The case does, however, present a deli-

cate problem in the administration of criminal justice aside from the legal correctness of the rulings involved. That problem is the extent to which one judge must feel himself bound by the announced intention of another judge of coordinate jurisdiction with which the ruling judge cannot in good conscience agree.

The record strongly suggests that the petitioner left the hearing before Judge Clarke at which he pleaded guilty with the belief that he had been assured a maximum sentence of five years (*i.e.*, two concurrent five-year sentences), and that the three remaining counts would be dismissed. The three remaining counts had not, however, been dismissed, and when the case came before Judge Hall (to whom it had previously been assigned for trial), he found himself unable to agree with Judge Clarke's intended disposition of the matter. He found that there was no probation report which would be a guide as to the proper disposition of the case (and which in fact would have disclosed that petitioner had a prior sentence for a state offense). He also found that the amount of heroin involved was very large and his feeling was that, on such a serious charge, the facts should be fully developed before a jury—in other words, that there should either be an acquittal or a consideration of the sentence on the basis of all the facts. And, although he did not expressly rest his determination on that ground, he might also have felt that the plea of guilty to counts 1 and 2 had been accepted without fair compliance with Rule 11, F.R. Crim. P., as to the petitioner's knowledge of the charges and his understand-

ing of the plea. This is perhaps what Judge Hall meant when he said that the situation had the appearance of a bargain.

Under these circumstances, it was the ruling of Judge Hall that petitioner should go to trial on all five counts (a ruling which, as we show, he was empowered to make). He made that decision on his own, without urging or even participation of the United States Attorney. But when Judge Hall, as the Chief Judge of the District Court, ruled that the charges were so serious that the case ought to be developed in full before a jury, the United States Attorney had, we think, no choice but to present the facts and try the case as he would had there never been an attempt to enter the plea of guilty to two counts. After development of the facts at the trial, and petitioner's conviction on four of them (with an acquittal at the direction of the court on one count to which the plea of guilty had been accepted), Judge Hall imposed a sentence which he deemed adequate for the offense proved—a total of twenty years' imprisonment. This sentence was four times as long as the sentence which petitioner could reasonably have felt had been promised to him, not by an agent of the prosecution, but by the district court acting through Judge Clarke.

The net result of the proceedings before Judge Clarke and Judge Hall's subsequent rulings, coupled with the trial and the sentences imposed after conviction upon four counts, was probably, in petitioner's view, to renege upon the promise and quadruple the length of his prison sentence. Petitioner could hardly have avoided a deep sense of grievance.

The situation is obviously not a happy one. It calls, we think, for serious consideration as to whether the administration of the calendar in certain district courts should not be re-examined with respect to participation by different judges at the various stages of a single criminal proceeding. So long as a court acts through different personalities, differences in results on the same facts are bound to occur, though each judge acts in good conscience. In these circumstances, the only questions that we can discuss are the legal issues—the questions of power. Those are the issues we have briefed. They do not answer the question which remains—whether, irrespective of the legal issue of power, the natural grievance resulting from the difference between a promise of a five-year sentence and the resulting twenty-year sentence so departs from the appearance of even-handed justice before a district court of the United States that some relief ought to be granted under the supervisory power of this Court. We think that this is a matter involving the judicial function [illegible] judicial conscience which is for this Court to resolve in the exercise of its supervisory power.

I

WHOLLY APART FROM WHETHER JUDGE HALL PROPERLY VACATED THE PLEAS OF GUILTY TO COUNTS 1 AND 2, PETITIONER WAS VALIDLY TRIED ON COUNTS 3, 4, AND 5. SINCE PETITIONER'S CONVICTION UNDER THE LATTER COUNTS SUPPORTS HIS SENTENCE, THIS COURT NEED NOT CONSIDER WHETHER HE WAS ALSO PROPERLY TRIED UNDER COUNTS 1 AND 2

Petitioner contends that, after Judge Clarke had accepted his guilty pleas to two counts of the five-count indictment, Judge Hall had no power either to vacate those pleas without petitioner's consent, or to require him to stand trial on the other counts. We submit, however, that, since there was no final disposition of counts 3 to 5 at the initial proceeding before Judge Clarke, Judge Hall was justified in requiring petitioner to stand trial on those counts. Since petitioner's conviction under counts 3 to 5 supports his sentence, there is no occasion for this Court to consider whether Judge Hall erred in vacating the guilty pleas to counts 1 and 2.

A. JUDGE HALL PROPERLY REQUIRED PETITIONER TO STAND TRIAL ON COUNTS 3 TO 5

When petitioner appeared before Judge Hall on July 29, 1958, the situation was as follows: Petitioner had originally pleaded not guilty to all five counts of the indictment, and his case had been set for trial before Judge Hall on July 15, 1958. On June 26, 1958, however, before Judge Clarke, he had withdrawn his pleas of not guilty to counts 1 and 2, and had entered pleas of guilty. Judge Clarke had immediately indicated that he would impose concurrent

sentences of five years under those two counts. However, Judge Clarke had deferred sentencing pending the trial of petitioner's co-defendant, and had fixed July 21, 1958 (a date after that fixed for such trial) for sentencing.

No disposition was made by Judge Clarke on June 26 of the other three counts, to which petitioners' earlier pleas of not guilty remained standing. Indeed, Judge Clarke expressly stated on June 26 that "we will hold the disposition of the other Counts * * * until July 21st at 2:00 p.m." (R. 17).

In these circumstances, we submit that, wholly apart from whether Judge Hall on July 29, 1958, properly vacated the pleas of guilty to counts 1 and 2, he was empowered to require petitioner to stand trial on the remaining three counts. For neither a defendant nor the government has any "right" to a dismissal of any valid count of an indictment returned by a grand jury. Rule 48(a) of the Federal Rules of Criminal Procedure provides that the government may dismiss only "by leave of court," and the grant or denial of such leave to dismiss is not a mere ministerial act, but calls for the exercise of the court's sound discretion. *United States* v. *Shanahan,* 168 F. Supp. 225 (D. Ind.); *United States* v. *Doe,* 101 F. Supp. 609 (D. Conn.). Thus, even if Judge Hall had not vacated the guilty pleas on the first two counts, he still could have directed trial on the remainder of the indictment. Petitioner never offered to plead guilty to counts 3 to 5.

Petitioner's claim (Br. 41) that he had "agreed" with the government that, upon his pleading guilty

to counts 1 and 2, the remaining three counts would be dismissed did not entitle him to a dismissal of the latter counts. The government cannot enter into a binding agreement with one who has been indicted that he will not be prosecuted, either for all or for part of the crimes with which the grand jury has charged him. *Whiskey Cases,* 99 U.S. 594; *District of Columbia* v. *Buckley,* 128 F. 2d 17 (C.A. D.C.), certiorari denied, 317 U.S. 658. While the government often indicates to a defendant that it will seek a dismissal of part of an indictment upon a plea of guilty to the other part, the court is not required, upon such guilty plea, to dismiss the remaining counts. Moreover, even if the remaining counts are dismissed in such circumstances, there is no legal barrier to subsequent reindictment and trial for the offenses charged therein. *Dandridge* v. *United States,* 265 F. 2d 349 (C.A. D.C.); see *Spriggs* v. *United States,* 225 F. 2d 865 (C.A. 9), certiorari denied, 350 U.S. 954; *United States* v. *Shanahan, supra; United States* v. *Garces Dorrego,* 17 F.R.D. 340 (D.P.R.); *Buie* v. *United States,* 76 F. 2d 848 (C.A. 5), certiorari denied, 296 U.S. 585; cf. *Parr* v. *United States,* 351 U.S. 513.

Thus, without regard to whether Judge Hall lawfully vacated the guilty pleas to counts 1 and 2 (and, as we show in Point II, *infra,* pp. 42–50, he did), the judgment below must stand. For petitioner was acquitted on count 1, and his sentence on count 2 was concurrent with that on count 3. Hence, neither of the counts with respect to which petitioner's guilty pleas were vacated affects petitioner's sentence. Ac-

cordingly, the Court need not reach the issues as to the propriety of Judge Clarke's deferral of sentencing and Judge Hall's subsequent vacation of the guilty pleas.

B. EVEN IF THE PLEAS OF GUILTY UNDER COUNTS 1 AND 2 SHOULD HAVE BEEN ALLOWED TO STAND, THAT WOULD NOT HAVE BARRED PETITIONER'S TRIAL UNDER COUNTS 3 TO 5

Petitioner contends (Br. 42–46) that if, as he argues, Judge Hall erred in vacating the pleas of guilty to counts 1 and 2, his trial on counts 3 to 5 either constituted double jeopardy or, at least, violated the governmental policy involved in *Petite* v. *United States*, 361 U.S. 529, 530, against successive prosecutions for "several offenses arising out of a single transaction." Neither contention has merit.

1. *There Was No Double Jeopardy.* The indictment in this case charged a conspiracy to violate the narcotics laws (count 1) and four separate sales of narcotics on different days approximately a week apart (counts 2 to 5). Plainly, the sale charged in count 2 (April 28, 1958) was a separate and distinct offense from the sales charged in count 3 (May 7, 1958), count 4 (May 13, 1958), and count 5 (May 21, 1958) (R. 2–3). This Court unanimously held in *Blockburger* v. *United States*, 284 U.S. 299, that two sales on successive days to the same purchaser constituted separate offenses. Cf., also, *Gore* v. *United States*, 357 U.S. 386, where both the majority and minority of the Court recognized that separate sales of narcotics to the same purchaser two days apart con-

stituted separate offenses.[8] *A fortiori,* therefore, the sales in this case, approximately a week apart, were separate offenses. Thus, even if the plea of guilty to count 2 had been allowed to stand and petitioner had been sentenced thereunder, the court still had jurisdiction to try and, if conviction resulted, to sentence petitioner on the other substantive counts. See *Dealy* v. *United States,* 152 U.S. 539, 542–543; *United States* v. *Bent,* 175 F. 2d 397 (C.A. 8), certiorari denied, 338 U.S. 829.

Nor is the situation any different with respect to the conspiracy charged in count 1. A conspiracy to sell narcotics is a separate and distinct offense from a sale of narcotics, and separate punishments may be imposed for the conspiracy and the sale. See *American Tobacco Co.* v. *United States,* 328 U.S. 781, 788–789. The substantive offense of selling narcotics may be committed without any conspiracy, and a conspiracy to sell narcotics is a crime whether or not a sale was actually consummated. *United States* v. *Rabinowich,* 238 U.S. 78, 86. Thus, trial on the substantive counts after a plea of guilty to the conspiracy count would not constitute double jeopardy. See *Sealfon* v. *United States,* 332 U.S. 575, 578; *Pinkerton* v. *United States,* 328 U.S. 640, 643; *Pereira* v. *United States,* 347 U.S. 1.

The fact that the conspiracy count to which petitioner pleaded guilty alleged, as overt acts in furtherance of the conspiracy, the deliveries of narcotics

[8] The division in the Court in *Gore* arose over whether separate punishments may be imposed for several narcotics offenses growing out of a single sale. The majority held that they may.

involved in three of the four sales charged as substantive offenses, does not support petitioner's contention (Br. 44) that his guilty plea to the conspiracy count barred his subsequent prosecution for the substantive offenses of selling. In the first place, the overt acts alleged were merely the delivery of the narcotics. Although such deliveries were elements of, they were not the same as, the sales charged in the substantive counts. In any event, a plea of guilty to a conspiracy charge does not necessarily admit all of the overt acts alleged in the charge. Since only a single overt act need be shown in order to prove a conspiracy, a plea of guilty to such charge need admit only one such act (*Bergen* v. *United States*, 145 F. 2d 181, 188 (C.A. 8))—and this is merely to show that the conspiracy has progressed beyond merely a naked agreement and actually "is at work" (*Yates* v. *United States*, 354 U.S. 298, 334).

2. *Petitioner's Trial on Counts 3, 4, and 5 Did Not Violate the Governmental Policy Involved in Petite* v. *United States.* Petitioner's reliance (Br. 43–46) upon *Petite* v. *United States*, 361 U.S. 529, is misplaced. That policy is not applicable to the facts of this case; in any event, it is merely a policy that guides the government in instituting criminal prosecutions, and it therefore cannot serve to invalidate the action of Judge Hall in requiring petitioner to go to trial on counts of an indictment to which he had pleaded not guilty and which had not been disposed of.

Petite was tried under two indictments charging (1) a conspiracy to make false statements to an agency of the United States at hearings in Philadel-

phia and Baltimore and (2) suborning perjury at the Philadelphia hearings. Petite went to trial on both indictments, but at the close of the government's case he changed his plea to *nolo contendere* to the conspiracy charge, and the government dismissed the subornation charge. He was fined and imprisoned. Subsequently, he was indicted and convicted, over his plea of double jeopardy, for suborning the perjury of two witnesses at the Baltimore hearings, which testimony had been included as overt acts in the conspiracy indictment. After this Court had granted certiorari, the government filed a motion, which the Court granted, to vacate the judgment below and to remand the case to the district court with directions to dismiss the indictment, on the ground that the second prosecution was contrary to the "general policy of the Federal Government 'that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement' " (361 U.S. at 530).

In the instant case, however, there were not "several offenses arising out of a single transaction," but a series of separate transactions which were "alleged and tried together" in a single indictment. Moreover, the government has never deemed separate sales of narcotics on different days to constitute "several offenses arising out of a single transaction" to which the policy against "multiple prosecution" is applicable, even though all such sales are made to the same

purchaser. Finally, even if the *Petite* policy were applicable to this case, it would not have affected Judge Hall's authority to require trial on counts 3 to 5. Indeed, in *Petite* the Court stated (361 U.S. at 531) that, in granting the government's motion, "we are of course not to be understood as remotely intimating in any degree an opinion on the question of double jeopardy sought to be presented by the petitioner for certiorari."

3. *Judge Hall Did Not Abuse his Discretion in Requiring that Counts 3 to 5 be Tried.* There is thus no issue of double jeopardy or of the so-called *Petite* policy involved in the question whether petitioner's prior guilty pleas to counts 1 and 2 barred his trial under counts 3 to 5. The only remaining issue, therefore, is whether Judge Hall abused his discretion in ruling that counts 3 to 5 should be tried. We submit that he clearly did not.

Judge Hall was not required to dismiss those counts merely because Judge Clarke had previously accepted pleas of guilty to counts 1 and 2 and presumably would have granted a government motion to dismiss the other counts after he imposed sentence. This is particularly so since Judge Hall concluded that the circumstances surrounding the acceptance of the guilty pleas were such as to call for their vacation. See Point II, *infra*, pp. 42–50. Prior to vacating the pleas of guilty and setting the five counts for trial, Judge Hall examined the file in the case (R. 23). In

view of the substantial amount of narcotics involved,[9] he was justified in concluding that petitioner "ought to be tried and have a jury determine his guilt" on counts 3 to 5 (R. 29; see R. 25).

C. SINCE COUNTS 3 TO 5 WERE PROPERLY TRIED, PETITIONER WAS NOT CONVICTED UNDER COUNT 1, AND HIS SENTENCE UNDER COUNT 2 IS CONCURRENT WITH THAT UNDER COUNT 3, NO ISSUE AS TO THE VALIDITY OF HIS TRIAL UNDER COUNTS 1 AND 2 REMAINS IN THE CASE

1. Judge Hall dismissed the conspiracy count (count 1) at the close of the government's case for lack of proof (R. 72). As to this count, therefore, petitioner plainly has suffered no legally cognizable injury because Judge Hall required him to stand trial thereunder.

2. Nor has petitioner been injured by the five-year sentence imposed under count 2. That sentence runs concurrently with the five-year sentence under count 3, and it, therefore, has no separate significance. Thus, even if this Court were to hold that petitioner had been improperly tried and convicted under count 2 (which we do not believe to be the case, see Point II, *infra*, pp. 42*ff*), that would not change his sentence. Accordingly, the conviction under count 2 is governed by this Court's settled practice, in cases

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[9] Petitioner was charged with narcotics violations involving a total of 15 ounces of heroin, a drug whose importation or manufacture is completely forbidden in the United States. See *Harris* v. *United States*, 359 U.S. 19, 22, fn. 8. There are 437½ grains to one ounce. As a comparison, the conviction in *Blockburger* v. *United States*, 284 U.S. 299, 301, involved a total of 18 grains of morphine hydrochloride. *Harris* involved 224 grains of heroin.

involving convictions under multiple counts, that it will not review convictions under particular counts that are not necessary to support the sentence. *Locke* v. *United States*, 7 Cranch. 339, 344; *Clifton* v. *United States*, 4 How. 242, 250; *Snyder* v. *United States*, 112 U.S. 216, 217; *Claassen* v. *United States*, 142 U.S. 140, 146; *Pierce* v. *United States*, 252 U.S. 239; *Brooks* v. *United States*, 267 U.S. 432; *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Pinkerton* v. *United States*, 328 U.S. 640, 642, fn. 1; *United States* v. *Sheridan*, 329 U.S. 379, 381; *Roviaro* v. *United States*, 353 U.S. 53, 59, fn. 6; *Lawn* v. *United States*, 355 U.S. 339, 359.

3. The vacation of petitioner's guilty pleas to counts 1 and 2 not only did not prejudice him but, because of his trial under counts 3 to 5, was to his advantage. As to the conspiracy count, the benefit was clear, since at the trial that count was dismissed by the court for failure of proof. As to count 2, petitioner would have been under a severe handicap in presenting his defense of entrapment as to the sales charged in counts 3 to 5 if he had admitted the sale charged in count 2.

4. The foregoing arguments also make it unnecessary for the Court to consider petitioner's contention (Br. 16–22; Amicus Br. 3–6) that the postponement of sentencing on June 26, 1958 (when Judge Clarke accepted his pleas of guilty to counts 1 and 2), pending the trial of his co-defendant, constituted an unreasonable delay in sentencing, in violation of Rule 32(a) of the Federal Rules of Criminal Procedure, and denied him the right of a speedy trial under the

Sixth Amendment. For this contention, even if valid,[10] would establish only that petitioner should not have been tried under the two counts to which he had pleaded guilty. As we have already shown, however, no issue as to his trial under those two counts remains in the case, since he was acquitted on count 1 and his sentence under count 2 is concurrent with that under count 3. Thus, any improper delay in petitioner's sentencing under the counts to which he pleaded guilty could not invalidate his subsequent trial and conviction under the remaining counts on which he had pleaded not guilty and as to which Judge Clarke had made no disposition when he accepted the guilty pleas to counts 1 and 2.

II

THE PLEAS OF GUILTY TO COUNTS 1 AND 2 WERE LEGALLY VACATED

Although we believe that no issue as to the validity of petitioner's trial under counts 1 and 2 remains in this case (see Point I, *supra*), we shall now show that

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[10] This Court has not decided whether the sentence is part of the trial for the purposes of the Sixth Amendment. See *Pollard* v. *United States*, 352 U.S. 354, 361. Assuming *arguendo* that it is, what constitutes an "unreasonable delay" in sentencing "depends upon the circumstances" (*Pollard*, *supra*). The delay of a month in this case is not *per se* unreasonable. Although Judge Clarke had told petitioner on June 26, 1958, that he would impose the minimum sentence of five years when petitioner appeared before him for sentencing on July 21, 1958 (R. 17), it does not follow that this delay in sentencing was unreasonable. For Judge Clarke could have concluded, on the basis of what developed at the trial of petitioner's co-defendant, or from his own investigation, that a more severe penalty was appropriate.

Judge Hall had warrant for vacating the guilty pleas to those counts, and in requiring petitioner to stand trial on all the counts on which he had been indicted.

1. No sentence was imposed upon petitioner by Judge Clarke following the acceptance of the guilty pleas to counts 1 and 2. Although the judge stated that he planned to impose the minimum sentence of 5 years' imprisonment on each count, to run concurrently, that was not the sentence of the court. "The only sentence known to the law is the sentence or judgment entered upon the records of the court." *Hill* v. *Wampler*, 298 U.S. 460, 464. Indeed, Judge Clarke expressly deferred the actual imposition of sentence until a date subsequent to that set for the trial of petitioner's co-defendant (R. 17).

As petitioner's counsel conceded before Judge Hall (R. 28), the latter was not bound by Judge Clarke's statement as to the sentence he would impose. Even Judge Clarke, despite his stated intention to impose the minimum sentence, could have actually imposed a more severe sentence if he deemed it appropriate. Thus, if Judge Hall had not vacated the pleas of guilty to counts 1 and 2, he could have sentenced petitioner to from 5 to 20 years on each of those counts—as petitioner conceded (R. 27). 21 U.S.C. 174, *supra*, p. 3.

It is also significant that counts 3 to 5 had not been disposed of by Judge Clarke, and that petitioner's not guilty pleas to those counts remained standing. In view of the seriousness of the offenses (see *supra*, pp. 10, 40, fn. 9), Judge Hall was justi-

fied, as we have pointed out, in concluding that counts 3 to 5 should be tried (see *supra*, pp. 32–35, 39–40).

It was plainly to petitioner's advantage not to have his guilty pleas to counts 1 and 2 remain standing if he was to be tried on counts 3 to 5 (see *supra*, p. 41). The guilty pleas had been entered on the assumption that petitioner would not be tried. Once Judge Hall decided to try counts 3 to 5, however, it was "in the interests of justice" (R. 24) that the guilty pleas to the other counts be vacated—particularly since, as Judge Hall indicated when he stated that the acceptance of those pleas "smacks too much of having the appearance of a bargain" (R. 24), Judge Clarke had not fully complied with the requirement in Rule 11 of the Federal Rules of Civil Procedure that the court "shall not accept the plea [of] guilty without first determining that the plea is made voluntarily with understanding of the nature of the charge." See R. 15.

2. In such circumstances, we submit that Judge Hall had the power to vacate the guilty pleas made before Judge Clarke.

Rule 11 explicitly provides that "[t]he court may refuse to accept a plea of guilty * * *." It thus makes the acceptance or rejection of a guilty plea a matter for the sound discretion of the court.[11] Con-

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[11] The notes to both the Preliminary Draft and the Second Preliminary Draft of Rule 11 stated (Federal Rules of Criminal Procedure, Preliminary Draft, p. 48 (Government Printing Office, 1943); Federal Rules of Criminal Procedure, Second Preliminary Draft, p. 43 (Government Printing Office, 1944)):

"* * * That a defendant may plead guilty, and that the court may refuse or delay acceptance of the plea, is in accordance

trary to petitioner's contention (Br. 23–23), a defendant in a federal criminal case has no absolute "right" to plead guilty.

A corollary of the rule that a district judge may reject a plea of guilty is that, at least before sentence is imposed, he may on his own motion vacate a plea when required in the interests of justice. See *United States* v. *Bysozoski*, 144 F. Supp. 806 (D. N.J.). This power flows from the inherent power of the court to control its own judgments during term time. From the beginning of the common law, a normal incident of judicial power in English and American jurisdictions was the "general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court." *Bronson* v. *Schulten*, 104 U.S. 410, 415; see also *United States* v. *Mayer*, 235 U.S. 55. This Court in *United States* v. *Smith*, 331 U.S. 469, held that, with the abolition of the significance of the

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with the common law as followed in the federal courts. See *Hallinger* v. *Davis*, 146 U.S. 314, 318 (1892); *United States* v. *Trinder*, 1 F. Supp. 659 (D. Mont. 1932). See also 4 Blackstone, *Commentaries* (1769) * * 329, 332; and 1 Chitty, *Criminal Law* (5th Am. ed. 1847) * * 422, 434, 471."

See also 2 Hale, *Pleas of the Crown* (1847) 225; *Griffith* v. *State*, 36 Ind. 406, 409; *Wilson* v. *State*, 16 Ark. 601, 606; *State* v. *Roberts*, 1 Hayw. (N. Car.) 176; Orfield, *The Federal Rules of Criminal Procedure*, 22 Texas Law Review 37, 54; Longsdorf, *Preliminary Monograph on the Beginnings and Background of Federal Criminal Procedure*, 4 Barron, *Federal Practice and Procedure*, p. 36.

term of court, the time limits fixed by the Criminal Rules for taking action (*e.g.*, a motion for a new trial under Rule 33) marked the limits of the court's general authority in this respect, but nothing in that opinion suggests that, while a case is still pending before a court, the general plenary power of the court over its own proceedings is in any way limited. It was because a court, without specific authority, would have no power to vacate a plea of guilty after sentence that it was necessary for Rule 32 to provide that such a plea could be vacated in the interests of justice after sentence. But the conditions spelled out in Rule 32 which permit a defendant to move for withdrawal of a plea before sentence cannot, in view of the long-recognized control of a court over its proceedings, be read as limiting the inherent power of a court to reconsider its own actions in a case before it which has not yet been concluded. A plea of guilty is to a court, not to any particular judge, and the court has power to reconsider the initial decision to accept the plea.[12]

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[12] Contrary to petitioner's contention (Br. 26), *Rex* v. *Grant*, [1936] 2 All Eng. Rep. 1156, does not hold that a court cannot vacate a guilty plea on its own motion. At that time in England, a magistrate had discretion, in certain classes of cases, either to try them summarily himself, or to transfer them to Quarter Sessions. A magistrate initially took jurisdiction of such case and permitted the defendant to plead guilty; subsequently, however, the magistrate decided he should not handle the case. He transferred it to Quarter Sessions, where the defendant was tried and convicted. The Court of Criminal Appeals held that the Quarter Sessions should have accepted the defendant's plea of *autrefois convict*, and it quashed the conviction.

There was no question in *Grant* of the power of one judge of a court to vacate a guilty plea made before another judge. The

3. Petitioner contends (Br. 34–39; see Amicus Br., 7–13), however, that jeopardy attached when his guilty pleas to counts 1 and 2 were accepted, and that this barred his subsequent trial on those counts even though the pleas were vacated. But petitioner, who was represented by counsel, never raised the constitutional issue before Judge Hall,[12] and it is therefore not open to him now. *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 113 (privilege against self-incrimination); *United States* v. *Gale*, 109 U.S. 65 (constitutionality of statute disqualifying jurors); see *Yakus* v. *United States*, 321 U.S. 414, 444 ("* * * a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it"). In any event, we submit that, although a plea of guilty may result in jeopardy if permitted to stand, it does not have that effect where it has been properly vacated.

"The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. * * * The underlying idea * * * is that the State

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issue there was whether the acceptance of a guilty plea by an inferior court, which plea was never vacated, barred a subsequent trial for the same offense by a superior court.

[12] Although petitioner objected to Judge Hall's vacating the guilty pleas and ordering him to stand trial on counts 1 and 2, the basis was not that it would subject him to double jeopardy, but that Judge Hall had erred in concluding that there was the appearance of a "bargain" between petitioner and Judge Clarke (R. 27–31).

with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States,* 355 U.S. 184, 187–188. "The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trail fails to end in a final judgment" (*Wade* v. *Hunter,* 336 U.S. 684, 688). The "guiding rule of federal courts * * * [is that] a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice" (*Wade* v. *Hunter, supra,* at 689–690; see *United States* v. *Perez,* 9 Wheat. 579, 580). There is "no rigid formula" (*Wade* v. *Hunter, supra,* at 690). Thus, although the general rule in this country is that "a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again" (*Green* v. *United States, supra,* at 188), no jeopardy results from a second trial where the court, over the defendant's objection, properly declares a mistrial at the first trial. *Simmons* v. *United States,* 142 U.S. 148; *Thompson* v. *United States,* 155 U.S. 271, 274.

The policy considerations that permit a second trial following a mistrial on the court's own motion also support the conclusion that no jeopardy results

where a guilty plea is vacated in the interests of justice. A plea of guilty, followed by imposition of sentence, constitutes of conviction which bars a second prosecution for the same offense. But the mere acceptance of a guilty plea, without any judgment or sentence, is not a conviction, and the subsequent vacation of the plea for valid reasons has the effect of "adjudg[ing] that the plea of guilty be held for naught" (*Kercheval* v. *United States,* 274 U.S. 220, 224). Here, the facts that the pleas were made to Judge Clarke on the assumption that petitioner would not be tried, and that Judge Hall subsequently determined that petitioner should be tried on counts 3 to 5, "manifest[ed] a necessity for" vacating the pleas and indicated that "failure to [vacate] would defeat the ends of justice" (*Wade* v. *Hunter, supra,* at 689–690). In these circumstances, we submit that petitioner was not subjected to double jeopardy by his trial on the counts as to which his guilty pleas were vacated.[14]

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[14] *United States* v. *Sabella,* 272 F. 2d 206 (C.A. 2), upon which petitioner relies (Br. 36–37), is distinguishable. In *Sabella,* the defendants pleaded guilty to narcotics offenses, were sentenced to fine and imprisonment, and began to serve their sentences. Through Congressional inadvertence, however, the statute under which they were convicted did not provide any penalty. When this fact became known, the defendants petitioned for habeas corpus and the government moved to set aside the sentences. The district court vacated the sentences, set aside the judgments of conviction, and dismissed the indictment. The government then obtained a new indictment based on "the identical act involve in the first indictment" (272 F. 2d, at 208), and, over their pleas of double jeopardy, the defendants were convicted. The court of appeals reversed. Pointing out that "[t]here is some degree of unreality in a claim that a

III

THE COURT'S RULINGS MADE DURING PETITIONER'S EXAMINATION OF THE WITNESS SINGH DID NOT DENY PETITIONER A FAIR TRIAL

When Treasury agent Lienanan, to whom petitioner made the sales of narcotics involved in this case, first met petitioner, he was accompanied by Roy Singh, a "special employee" of the Federal Bureau of

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convicted defendant who has been in jail has not been in jeopardy" (p. 208), the court held that the defendants had been placed in jeopardy at the first trial through "exposure to a valid judgment of conviction" (*ibid.*), since, even though the statute under which they had been indicted provided no penalty, "the District Court had power to render a lawful judgment of conviction" (p. 210).

Sabella thus involved conviction under a second indictment for the same offense for which the defendants not only had previously pleaded guilty, but for which they had been sentenced and had served part of their sentences. In the instant case, however, petitioner, although he had pleaded guilty, had not been sentenced; his guilty pleas were subsequently vacated; and only a single indictment had been returned against him for the offenses for which he was convicted.

Riadon v. *United States*, 274 F. 2d 304 (C.A. 6), certiorari denied, 364 U.S. 896, on which petitioner also relies (Br. 38), similarly involved convictions under two separate indictments (which were based on the same conduct). The defendant pleaded guilty to one indictment, and the question was whether that plea barred his conviction under the other. The court held that it did not, on the ground that even though the plea to the first indictment had placed the defendant in jeopardy, the offenses charged in the two indictments were not the same. The court stated (p. 306, emphasis added), by way of dictum, that "a plea of guilty puts the accused in jeopardy, and even though the plea be withdrawn, or its acceptance refused by the trial judge, *so long as it is permitted to stand*, there is jeopardy * * *." In the instant case, of course, the guilty pleas were not "permitted to stand," but were vacated by Judge Hall.

Narcotics (R. 31, 33–34, 46). Prior to introducing Lieuanan to petitioner, Singh went into petitioner's home alone (R. 47, 58). Singh had a letter of introduction to petitioner from petitioner's cousin, who was in jail (R. 47).

The government did not call Singh as a witness. His identity was disclosed on the first day of trial (R. 45), and he was present in the courtroom the following morning (R. 46).

At the close of the government's case, in response to a question by petitioner's counsel whether the court would give an instruction on the government's failure "to call a witness who is a former employee or agent, to be used as a presumption," the court stated that it did not believe that Singh's testimony was material to the government's case (R. 73–74). When petitioner's counsel replied that the testimony was material on entrapment, the court stated that it was up to the defense to decide whether to call Singh (R. 74). Counsel then asked whether, if he called Singh, the witness would be treated as hostile. The court replied: "I don't know whether he will be hostile or whether he won't. I can't tell until he testifies" (R. 74).

Petitioner then called Singh as his own witness. The first question asked was whether Singh had had any conversation with petitioner's counsel. Singh said, "Yes, I did." The next question was to relate the nature of that conversation; to this question the court sustained an objection as irrelevant (R. 76).

A conference was then had at the bench, at which petitioner's counsel stated that he wanted to "make

this man a hostile witness, and I would like to show that he refused to discuss the case with me and that, in so doing, he was advised of his rights not to discuss this case with me by the United States Attorney * * *" (R. 77). The court pointed out that "[t]he way to determine whether or not a witness is a hostile witness is for you to ask him questions. * * * I don't know what questions you want to ask him. I don't know what is in your mind" (R. 77).

Petitioner's counsel replied (R. 77):

> I want to show he is unwilling to talk to me, unwilling to supply me with any information so that I could determine whether or not he was a hostile witness. I want to show that he was advised in that by the Government.
>
> The COURT: I don't think you can do it in this fashion. You have got to ask him questions, and then, if he refuses to answer them or if he evades them or shows hostility on the witness stand, this is the test, now, when he is on the stand. It isn't when he is out in the hallway or someplace else. * * * I can't tell by what conversations you had with him before.

Following further colloquy (R. 77–78), the court pointed out (R. 78) that "the only difference between a hostile witness and another witness is that you're allowed to cross-examine a hostile witness", and it suggested (R. 78–79) that petitioner's counsel should

> start out and ask him some questions, and if it appears that he is hostile, then I can determine from his attitude now on the witness stand his hostility * * *
>
> * * * Why don't you ask him * * * If he knows the defendant, if he knows Licuanan, if

he knows so and so. He may not be hostile. I don't know.

Petitioner's counsel then asked—and Singh answered—a number of questions relating to his dealings with petitioner, the advice given him by the United States Attorney with respect to discussing the case with petitioner's counsel, his prior convictions, and his past and present use of narcotics (R. 79–86). The pertinent portions of this testimony are set forth in Appendix B, *infra*, pp. 68–72. The court sustained objections to certain questions as leading, calling for a conclusion, remote, argumentative, irrelevant or immaterial.[15] The court also refused to permit petitioner's counsel to examine Singh's arm to "determine whether he is presently using narcotic drugs," on the ground that no foundation therefor had been established (R. 83).

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[15] The questions, objections and rulings were as follows (R. 81):

"Q. Did you tell the defendant that the reason you wanted to get drugs was in order to raise money to get Julio Contreras out of jail?

"Mr. Bevan: Objected to as leading, your Honor.

"The Court: Sustained.

"Q. Are you an employee of the United States Government?

"Mr. Bevan: Objected to as calling for a conclusion of the witness, and leading.

"The Court: Sustained.

"Q. Will you describe for the jury your present relations with the United States Government?

"Mr. Bevan: Objected to as too remote, your Honor.

"The Court: Sustained.

"Q. Are you presently engaged in narcotic activity on behalf of the United States Government?

"Mr. Bevan: Objected to as argumentative, irrelevant and immaterial.

"The Court: Objection sustained."

Petitioner now contends (Br. 51) that he was denied due process of law because the trial court "refused to permit petitioner to treat him [Singh] as a hostile witness, refused to permit petitioner to explore thoroughly his relationship with the Government, and generally refused petitioner an effective examination of Singh." There is no substance to these contentions.

1. The trial court properly ruled that it could not determine, in advance of Singh's testimony, whether he would be a hostile witness. The determination whether a witness is hostile is within the discretion of the trial judge, based upon what he sees and hears of the witness on the stand. *Stevens* v. *United States*, 256 F. 2d 619 (C.A. 9). Only in response to relevant questions can the judge determine and appraise hostility, recalcitrance, or evasiveness. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 233. The court thus correctly refused to treat Singh as a hostile witness at the outset, and properly suggested to petitioner's counsel that he should ask Singh "some questions, and if it appears that he is hostile, then I can determine from his attitude now on the witness stand his hostility" (R. 78).

The government's failure to call Singh did not establish that he would be hostile to petitioner. From the government's point of view, Singh, who merely introduced the federal narcotics agent to petitioner, could add little or nothing to the evidence given by the agent. The government was not obliged to call Singh merely because he was an informant. *Washington* v. *United States*, 275 F. 2d 687, 690 (C.A.

5); see *Masciale* v. *United States*, 356 U.S. 386. Nor was Singh shown to be hostile because he exercised his right not to discuss the case with petitioner's counsel.[18] Such refusal may have been made to avoid importunities to testify favorably toward petitioner, or for any of a number of other reasons having nothing to do with hostility toward petitioner.

2. Petitioner's direct examination of Singh (R. 79–87) did not establish that he was a hostile witness. On the contrary, Singh answered all questions directly and unhesitantly, and gave testimony that reflected adversely upon himself and tended to support petitioner's claim of entrapment. Thus, Singh admitted that he did not use the federal agent's correct name when he introduced the latter to petitioner (R. 80), and that he had used narcotics and had been convicted of a narcotic offense (R. 81, R. 86). Singh also testified freely with respect to whether he had received any money or narcotics for introducing the the agent to petitioner, or had been promised or had received anything for his testimony, answering both questions negatively (R. 81, 85). Significantly, although the trial judge had suggested that petitioner should ask Singh "some questions" so that the court could "determine from his attitude now on the witness stand his hostility" (R. 78), petitioner did not renew his claim of hostility on the basis of Singh's answers to those questions.

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[18] Singh testified (R. 85) that the government had advised him that petitioner's counsel "might want to talk to me, and that it was up to me to discuss the case with you, if I wanted to or not"; and that it was up to Singh "to determine * * * whether or not [he] would discuss it".

3. The trial court was warranted in sustaining objections to certain questions as calling for a conclusion, remote, argumentative, irrelevant, or immaterial (see note 15, *supra*, p. 53). Some of the questions would have been objectionable even if addressed to a hostile witness. Although others could have been rendered unobjectionable by rephrasing, petitioner made no attempt to correct them. Thus, while an objection was sustained to the leading question, "Did you tell the [petitioner] that the reason you wanted to get drugs was in order to raise money to get Julio Contreras [petitioner's cousin] out of jail?" (R. 81), the defect could have been easily cured by asking "What did you say to petitioner?" Petitioner's counsel did not attempt to pursue, in proper form, the inquiries which the court had excluded in the form in which they were asked.

Although Singh was called as petitioner's witness, petitioner made no attempt to develop a logical or consecutive story from the witness. To a considerable extent, petitioner's examination of Singh seemed designed primarily to discredit him, rather than to develop the facts with respect to petitioner's defense of entrapment. But, as the court pointed out in *Beasley* v. *United States*, 218 F. 2d 366, 368 (C.A. D.C.), in holding that limits imposed upon the direct examination of an informer called by the defense were proper:

> The defense may not call a witness who has not testified merely to attempt to discredit him in the course of eliciting adverse testimony * * *.

The scope of permissible examination, whether the witness is friendly or hostile, lies within the sound discretion of the trial court. The court did not abuse its discretion here in sustaining objections to a few of the many questions that petitioner asked Singh—questions which counsel did not then attempt to ask in proper form.

IV

THE EVIDENCE SUPPORTS THE JURY'S VERDICT THAT PETITIONER MADE THE SALE CHARGED IN COUNT 5

Petitioner challenges the sufficiency of the evidence to support his conviction under count 5 (Br. 57–60). (The sufficiency of the evidence under the other counts is not questioned.) The facts are not in dispute; the only issue is whether they justified the jury in finding that petitioner made the sale of heroin charged in count 5.

Briefly summarized, the facts are that the government agent, after previous purchases from petitioner, made arrangements to pick up heroin on May 21, 1958. The price appears to have already been determined. Petitioner and Palomino (the co-defendant) were waiting for the agent in front of petitioner's home on that date. After settling on the amount to be delivered, Palomino drove away. When Palomino returned, petitioner walked over to the car and received from him a brown paper bag that contained the narcotics. The agent asked petitioner if that was the "stuff," and petitioner replied "yes." The agent ran toward the car, and told petitioner and Palomino that they were under arrest. Petitioner threw the paper bag at

the agent and ran. See the Statement, *supra*, pp. 14–15.

The statute under which petitioner was convicted, 21 U.S.C. 174, makes it a crime for any person who "sells * * * or in any manner facilitates the * * * sale" of any narcotic drug that he knows has been illegally imported into the United States; it further provides that "possession of the narcotic drug * * * shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The word "sells" in the foregoing statute is used in its ordinary and popular sense. *Affronti* v. *United States*, 145 F. 2d 3, 9 (C.A. 8); see *Jin Fuey Moy* v. *United States*, 254 U.S. 189, 192. Whether there has been a sale, therefore, does not turn on niceties of title that have been developed in the law of sales. For "[n]othing was required at common law to give validity to a sale of personal property *except the mutual assent of the parties to the contract*" (*Hatch* v. *Oil Co.*, 100 U.S. 124, 130–131, emphasis added; see, also, *Hammer* v. *United States*, 249 Fed. 336 (C.A. 2)). At common law neither actual delivery nor payment is indispensable to complete a sale. Bishop, *Commentaries on the Law of Contracts*, 2d ed., 1907, p. 558. What is required is simply an agreement of the parties to transfer property plus an appropriation of the property to that end.

Accordingly, direct physical possession is not a necessary ingredient of a "sale" under 21 U.S.C. 174. See *Jin Fuey Moy* v. *United States*, *supra*, 254 U.S. 189; *United States* v. *Brandenburg*, 155 F. 2d 110, 111 (C.A. 3); *United States* v. *La Rocca*, 224 F. 2d 859

(C.A. 2). Even a physical transfer after arrest does not vitiate the sale, *United States* v. *Abdallah*, 149 F. 2d 219, 222 (C.A. 2). The touchstone in each case is the intent of the parties and the various incidents surrounding the transaction are significant only for their bearing thereon.

We submit that under this standard the evidence justified the jury in finding that petitioner made a sale of heroin to the agent on May 21, 1958, even though petitioner threw the narcotics to the agent upon his arrest, and the agreed-upon purchase price was not paid. There was here a sufficient appropriation of the goods, pursuant to an agreement to sell, to constitute a sale within the meaning of 21 U.S.C. 174. Both the petitioner in his testimony at one point, and petitioner's counsel referred to the transaction as a "sale" (see the Statement, *supra*, pp. 15–16, and R. 98, 114–115, 123). Petitioner's counsel told the jury—"* * * you will consider four sales of narcotics * * *" and "This is a case where the defendant on four occasions sold to the same man * * *" (R. 123). Petitioner's counsel neither requested any particular instructions on whether the transaction constituted a "sale", nor did he even intimate to the jury that it was not a sale. Petitioner's position was simply that the May 21st transaction, like the three other sales charged, was the result of entrapment. In view of petitioner's repeated references to this transaction as a "sale", the record of previous narcotic sales between the parties, and the specific proof of the elements of this transaction, we submit that the jury was justified in concluding that petitioner and the federal agent intended

to, and therefore did, effect a sale of narcotics on May 21, 1958.

V

THE INSTRUCTION ON ENTRAPMENT WAS PROPER

1. The trial court gave a detailed instruction on entrapment (R. 140–141), which set forth the governing substantive standards enunciated by this Court in *Sherman* v. *United States*, 356 U.S. 369, 372–373. The court pointed out (R. 140–141):

> When a person has had no previous intent or purpose to violate the law but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law as a matter of policy forbids conviction in such a case. On the other hand, where a person already has the willingness and readiness to break the law the mere fact that the Government agent provides what appears to be a favorable opportunity to break the law is no defense, but it is lawful entrapment.

Petitioner does not question the correctness of the substantive distinction that the government may set a trap to catch a criminal, but may not induce the criminal act. He contends only that the court's characterization of the former conduct as "lawful," and of the latter conduct as "unlawful," entrapment is incorrect and "can serve only to confuse the jury" (Br. 61).

We submit, however, that the instruction was not confusing, but on the contrary was designed to, and effectively did, explain to laymen in simple terms a

legal distinction that is often difficult either to grasp or to express. The portion of the charge set forth above, and the illustrative example subsequently given by the court (R. 141), properly presented to the jury the issue whether "the criminal design originate[d] with the officials of the Government" or whether government agents "merely afford[ed] opportunities or facilities for the commission of the offense" (*Sherman* v. *United States, supra,* at 372), *i.e.,* had petitioner been entrapped. Since this substantive distinction was clearly and correctly drawn, the jury could not have been confused by describing the former course of conduct as "unlawful," and the latter as "lawful," entrapment, rather than using such legal expressions as "entrapment" or "nonentrapment" (see, *e.g.,* such legal use in Note, *The Defense of Entrapment,* 73 Harv. L. Rev. 1333, 1345).

The instruction was taken from a proposed form of instruction on entrapment prepared by District Judge Mathes and published in 20 F.R.D. 231, 278–279 (R. 100). The use of these particular words in a charge was approved in *Trice* v. *United States,* 211 F. 2d 513, 517 (C.A. 9), certiorari denied, 348 U.S. 900. Many courts of appeals have themselves used these or similar words in describing what constitutes entrapment. *E.g.,* "Unlawful entrapment," *Reels* v. *United States,* 239 F. 2d 863 (C.A. 6); "lawfully entrap," *Lunsford* v. *United States,* 200 F. 2d 237, 239 (C.A. 10); "entrapment that is forbidden," approved in an instruction, *Butler* v. *United States,* 191 F. 2d 433, 437 (C.A. 4); "illegally entrapped," *Nero* v. *United States,* 189 F. 2d 515, 515–516 (C.A. 6), certiorari denied, 342

U.S. 872; "unlawful entrapment," *Purifoy* v. *United States*, 170 F. 2d 144, 145 (C.A. 5); "illegal entrapment," *Kott* v. *United States*, 163 F. 2d 984, 987 (C.A. 5), certiorari denied, 333 U.S. 837; "[t]here is no confusion as to the law of legal or illegal entrapment," *Mitchell* v. *United States*, 143 F. 2d 953, 957 (C.A. 10); "legally entrap," *C.M. Spring Drug Co.* v. *United States*, 12 F. 2d 852, 856 (C.A. 8); see also *Swallum* v. *United States*, 39 F. 2d 390 (C.A. 8); *St. Clair* v. *United States*, 17 F. 2d 886 (C.A. 8); *Ritter* v. *United States*, 293 Fed. 187, 189 (C.A. 9) ("unfair" entrapment).

2. Petitioner contends (Br. 62–63) that the entrapment instructions were further defective because they did not specifically state that, once inducement by the government is shown, the burden is on the latter to prove that the inducement did not cause the crime. But petitioner made no specific objection to the charge on this ground, and the point is therefore not open to him here. Rule 30 of the Federal Rules of Criminal Procedure provides that

> No party may assign as error any portion of the charge *or omission therefrom* unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection. * * * [Emphasis added.]

Long before Rule 30 this Court had declared that, where a defendant had failed to object specifically to instructions, there was "no question for review" as to their correctness. *Holder* v. *United States*, 150 U.S. 91, 92.

The rule requiring a defendant to particularize his objections to the charge, or omissions therefrom, is designed to enable the trial judge to correct any errors in the charge before the jury retires. If petitioner were correct in his argument that the charge did not adequately discuss the burden of proof issue, a simple objection would have enabled the court to cure any defect. But petitioner cannot accept the instructions on this issue as given and then, after the jury rejected his claim of entrapment, raise for the first time in this Court the claim that the charge was improper."[17]

In any event, we submit that the charge was adequate. The instructions, of course, must be read as a whole. The court charged that the burden is on the Government to prove "every material element in the offense" beyond a reasonable doubt (R. 133, 139); that the jury should acquit if it "should find that the accused had no previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the Government * * *" (R. 141); and that if the jury should find that "before anything at all occurred respecting the alleged offense involved in this case, the accused was ready and willing to commit crimes such as those charged in the indictment whenever opportunity was offered, and the Government merely offered the opportunity," there would be no entrapment (R. 141).

---

[17] Petitioner did not make the burden of proof argument in attacking the entrapment instruction in the court of appeals.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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FEBRUARY 1961.

APPENDIXES

APPENDIX A

Colloquy between court and defense counsel with respect to examining Mr. Singh as a hostile witness (R. 77–78):

Mr. REINHARDT: Your Honor, I would like to make this man a hostile witness, and I would like to show that he refused to discuss the case with me and that, in so doing, he was advised of his rights not to discuss this case with me by the United States Attorney; that he has been in full conference with the Government and the Government's witness since he has been in the courtroom today, and that his entire actions in connection with this case have been at the behest of the Government.

The COURT: I don't think that is material. I mean, I don't know. The way to determine whether or not a witness is a hostile witness is for you to ask him questions.

Mr. REINHARDT: How——

The COURT: I don't know what questions you want to ask him. I don't know what is in your mind.

Mr. REINHARDT: I want to show he is unwilling to talk to me, unwilling to supply me with any information so that I could determine whether or not he was a hostile witness. I want to show that he was advised in that by the Government.

The COURT: I don't think you can do it in this fashion. You have got to ask him questions, and then, if he refuses to answer them or if he evades them or shows hostility on the witness stand, this is the test, now, when he is on

the stand. It isn't when he is out in the hallway or someplace else.

Mr. REINHARDT. As I understand the rule, your Honor, the hostility of a witness is determined by all the circumstances involved in connection with his appearance in the court. That is my understanding, and if your Honor disagrees, that's your Honor's ruling.

The COURT. I can't tell by what conversations you had with him before.

Mr. REINHARDT. That's only part of what I want to show, your Honor. I want to show all the circumstances involved in connection with his appearance before the court at this time, what his contacts were with the parties, how he behaved toward the parties, how he got here.

The COURT. How he behaved what?

Mr. REINHARDT. What his relations were with the various parties prior to this time in connection with his appearance in court, in what manner he was brought into court, and the dealings he has had since he has been in the courtroom. And my understanding is that that is material.

The COURT. The question you had, now, is what conversations he had with you before court. I can't determine by that whether he is hostile or whether he isn't.

Mr. REINHARDT. You say that is not relevant to such a determination?

The COURT. Not at this stage of the proceeding. It might become, later. He hasn't been asked any questions except that one, and I can't determine the hostility from that.

Mr. REINHARDT. No. I didn't ask your Honor to determine the hostility on the basis of that.

Mr. BEVAN. That would be the only relevant purpose.

Mr. REINHARDT. I intend to use that as a part of a chain of evidence.

The COURT. Well, the only difference between a hostile witness and another witness is that you're allowed to cross-examine a hostile witness; that is all.

Mr. REINHARDT. That's right.

The COURT. So you start out and ask him some questions, and if it appears that he is hostile, then I can determine from his attitude now on the witness stand his hostility, and if then it becomes material, all the rest of this doesn't go to hostility. All you can do is cross-examine him——

Mr. REINHARDT. Yes, and impeach him, your Honor.

The COURT. You can cross-examine him, and all the rules of evidence apply. So why don't you ask him some questions?

Mr. REINHARDT. All right.

* * * * *

Appendix B

Pertinent portions of the testimony of the witness Singh:

Q. Mr. Singh, did you accompany——

The Court: Do you know the defendant in this case?

The Witness: Yes, I do.

Q. When did you meet the defendant in this case?

A. On April the 24th—or 28th, that is 1958.

Q. Were you accompanied by any other person at that time?

A. By Agent Licuanan.

Q. Pardon me?

A. By Agent Licuanan.

Q. Did you first see the defendant alone?

A. Yes, I did.

Q. Did you have any conversation with the defendant at that time?

A. I showed him a letter of introduction which I had, stating my name and what my business was there.

The Court: Did he keep the letter?

The Witness: No, he returned the letter to me.

The Court: Do you have it?

The Witness: No, I don't, sir. I met him in the back of his house, and then we went to the front and sat on the steps, and I told him that we wanted to make a purchase of some heroin, and that Mr. Licuanan was the buyer, he had the money, he was the man, and that I wanted him to talk to him. So I introduced Mr. Saldana to Agent Licuanan.

The Court: What did you say when you introduced them?

The WITNESS: Well, I just—I don't remember the name that I have for Mr. Licuanan, but I went through the motions of introduction by stating that that was the man with the money and he was going to do the buying.

Q. And you say you don't remember the name that you gave; is that correct?

A. That's correct.

The COURT: That he gave to Mr. Licuanan?

Mr. REINHARDT: Yes.

The COURT: You did not tell him his name was Licuanan?

The WITNESS: No, I did not, sir.

Q. You do remember the name you used?

A. I used?

Q. Yes.

A. Yes, I do.

Q. What name was that?

A. Roy.

Q. Did you tell the defendant your last name?

A. No, I didn't.

Q. Did you tell the defendant that you—Was the letter of introduction you brought to the defendant from Julio Contreras?

Mr. BEVAN: If he knows, your Honor. I think the question assumes that, I suppose.

The COURT: Yes.

The WITNESS: I assumed it was from Julio.

Q. You didn't read the letter that you brought him?

A. Yes, I did.

Q. Was it signed "Julio Contreras"?

A. Yes, it was.

Q. Was Julio Contreras in jail——

A. He was.

Q. ——if you know?

A. Yes, he was.

Q. Did you tell the defendant that the reason you wanted to get drugs was in order to raise money to get Julio Contreras out of jail?

Mr. BEVAN: Objected to as leading, your Honor.

The COURT. Sustained.

Q. Are you an employee of the United States Government?

Mr. BEVAN. Objected to as calling for a conclusion of the witness, and leading.

The COURT. Sustained.

Q. Will you describe for the jury your present relations with the United States Government?

Mr. BEVAN. Objected to as too remote, your Honor.

The COURT. Sustained.

Q. Are you presently engaged in narcotic activity on behalf of the United States Government?

Mr. BEVAN. Objected to as argumentative, irrelevant and immaterial.

The COURT. Objection sustained.

Mr. REINHARDT. Your Honor——

The COURT. Did you receive any money for introducing Mr. Licuanan to the defendant?

The WITNESS. No, sir, I didn't.

Q. Did you receive any narcotics for introducing the defendant to Mr. Licuanan?

A. No, sir, I didn't.

Q. Do you presently take narcotics, yourself?

A. What is that?

Q. Do you use narcotic drugs?

A. I have used, yes.

Q. Do you presently use narcotic drugs?

A. Presently, no. [79–82.]

* * * * *

The COURT. What did they tell you about their rights—that's what counsel means—about your rights?

The WITNESS. Well, they asked me—that you might want to talk to me, and that it was up to me to discuss the case with you, if I wanted to or not.

Q. It was up to you to discuss it with me if you wanted to or not?

The COURT. It is up to you to determine——

The WITNESS. Determine.

The COURT. ——whether or not you would discuss it?

The WITNESS. Yes.

Q. Were you also advised, then I asked you to go out into the hall, that that decision was also up to you? Did the United States Attorney advise you of that fact also?

A. Yes, he did.

Q. Did you then refuse to go out in the hall and discuss it with me?

A. Yes, I did.

Q. Have you been arrested in the last six months for a narcotic violation?

Mr. BEVAN. Objected to, your Honor.

The COURT. Objection sustained.

Q. Have you been promised anything by the Government in connection with your testimony in this case?

A. I have not.

Q. Have you received any compensation from the Government in connection with this case?

A. I haven't. [R. 84–85.]

* * * * *

Q. Have you ever been convicted of any felonies?

A. I have.

Q. Will you tell the jury and the court the nature of the offense for which you were convicted?

A. Possession of heroin and marihuana.

Q. Were those separate offenses or was that just one?

A. Well, just both——

The COURT. One offense.

The WITNESS. One offense.

Q. That is your only conviction of a felony?

A. And conspiracy.

The WITNESS. No, it was a different case, conspiracy.

The COURT. Two different cases?

The WITNESS. Yes.

The COURT. All in the same case?

Q. What was the date of your last conviction? Just the year; the year will be sufficient.

A. January 18, 1954. [R. 86.]

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IN THE

Supreme Court of the United States

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October Term, 1960.

No. 176

LEONARD SALDANA,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONER.

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IN THE

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October Term, 1960.
No. 176

LEONARD SALDANA,

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REPLY BRIEF OF PETITIONER.

Introductory Statement.

The Government, with commendable candor, has suggested to this Court that even if all the legal issues were to be resolved in the Government's favor, the imposition upon petitioner of a twenty-year sentence in lieu of the court-announced five-year term is a matter of "the judicial conscience which is for this Court to resolve in the exercise of its supervisory power." (Respondent's Br. 31.) We respectfully join in this suggestion. We believe that the treatment afforded petitioner in the district court falls far short of "civilized standards of procedure." *McNabb v. United States*, 318 U. S. 332, 340.

Petitioner does not, of course, agree with the Government's contentions as to the legal issues, and it is to these contentions that this Reply Brief is directed. Reply will be made herein only to certain of the issues which are not clearly joined in the briefs previously submitted. On other issues, the respective positions have been adequately stated, and no additional discussion seems required.

ARGUMENT.

I.

Clarification of Facts.

Before discussing the legal issues which we believe merit further argument, we must clarify several factual matters as to which erroneous impressions are created, undoubtedly inadvertently, by the Brief For The United States.

A. The Brief For The United States, states that petitioner's case had been assigned to Judge Hall for trial (at 2, 29). This suggests that when petitioner appeared before Judge Hall on July 29th, there may have been some intention of proceeding with a trial. The record clearly reflects that such was not the case.

When petitioner appeared for arraignment without counsel, Judge Clarke, who was presiding over the master criminal calendar, appointed counsel from the indigent defendant panel. He then suggested that a not guilty plea be entered so that petitioner's case might be tried along with that of Palomino, a co-defendant. Saldana then responded to the Clerk's inquiry by saying that his plea was "not guilty." His case, along with Palomino's, was placed on the trial calendar at a date subsequent to the time Judge Hall was scheduled to take over the master criminal calendar.* Following investigation by court-appointed counsel and full discussion between petitioner and such counsel, petitioner

*This is undoubtedly the event the Government has reference to when it states that petitioner's case was assigned to Judge Hall for trial. However, prior to the date on which Judge Hall took jurisdiction over the criminal calendar, the case was taken off the trial calendar because of petitioner's guilty plea. When Judge Hall subsequently *sua sponte* assumed jurisdiction over the case, it was not pursuant to any order relating to trial or any assignment for trial.

determined to enter a plea of guilty. Counsel then consulted with the Assistant United States Attorney who agreed to accept a plea of guilty to two counts, with the understanding that the three remaining counts would be dismissed. Since Judge Clarke was then still presiding over the master criminal calendar, the change in plea was set for his court by the United States Attorney. [R. 27.]

On June 26, 1958, Judge Clarke accepted pleas of guilty to counts one and two, and announced a five-year concurrent sentence. However, at the Government's request he delayed formal completion of sentencing procedures and formal dismissal of the remaining counts until after the trial of Palomino. Judge Clarke then set the matter for sentencing in *his* court on July 21 [R. 16-17], since it was anticipated that Palomino's trial would be completed by that date. Palomino's case, however, remained scheduled on Judge Hall's calendar for trial. On July 9, Palomino moved, before Judge Hall, for a continuance of his trial. At an *ex parte* proceeding, Judge Hall granted the motion and at the same time, in the absence of petitioner, petitioner's counsel and Government counsel, *sua sponte* transferred petitioner's proceedings to his own calendar.* As the record clearly reflects, petitioner's case was transferred for sentencing not for trial.**

While there is some confusion in the record and the Brief For The United States as to the proceedings

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*The record indicates he did so because he wished to assume jurisdiction over all defendants jointly charged in one indictment, even though one was merely set for sentence while the other was calendared for trial [R. 18, 23].

**"It Is Ordered that co-defendant Cadiana is transferred before this Court for sentence" [R. 4; see also R. 18, 19, 23].

which transpired before Judge Hall on July 21 and 22 (at which petitioner's counsel was not present), the facts are beyond dispute. The co-defendant had obtained a continuance until July 29. Prior to July 21, petitioner's counsel was advised of this, notified that sentencing would be delayed until the date of the co-defendant's trial, and told he need not appear until July 29.* This was the sole reason petitioner's counsel did not appear at the proceedings on July 21 and 22, and the sole reason that the sentencing was continued until July 29. Prior to Judge Hall's actions on July 29, there was never any suggestion made to petitioner's counsel that petitioner's plea be withdrawn.**

*That these are the facts is fully confirmed by the following statement of the Assistant United States Attorney made before Judge Hall on July 22:

> "On this case your Honor, it was on yesterday for sentence and you stated you wanted it brought up this morning and for his attorney to come in with him. I contacted his attorney and didn't get in to see his attorney until after 9:00 o'clock this morning, and he reminded me—and I think it may have slipped your mind yesterday—that both his sentence and the proceedings in the other matter were to be continued.
>
> "His attorney, a man by the name of Stephen Reinhardt, spoke to you very briefly about this case, and you informed us that you were going to continue the sentence on this case until the co-defendant, Albert Palomino, came to trial, that he is due for trial on the 29th of this month, and at that time Mr. Reinhardt asked you if there is any need for him to appear in court on Monday and have you continue the sentence, as he is a court appointed attorney, and you gave him that permission, that he did not need to be in court" [R. 19-20].

**In the proceedings on July 21, Judge Hall stated that petitioner might want to withdraw his guilty plea [R. 18-19]. This statement was made at a proceeding at which petitioner's counsel was not present (having been advised by Judge Hall that the hearing would be postponed until July 29). This statement of Judge Hall was not communicated to petitioner's counsel, and he first learned of it when he received the transcript on appeal.

and there was never any consideration given to such withdrawal by petitioner's counsel or by petitioner.

B. The Brief For The United States (at 29, 44) suggests erroneously that Judge Hall might have had some basis for his vacation of the guilty plea other than the two reasons discussed in the briefs of petitioner and of *amicus curiae*.* Specifically, the Government suggests that Judge Hall may have vacated the plea because there was no probation report in the file, or because he might have felt that the plea was accepted without full compliance with Rule 11, F. R. Crim. P., as to the petitioner's knowledge of the charges and his understanding of the plea. The Government even suggests that perhaps "what Judge Hall meant when he said that the situation had the appearance of a bargain" was the failure to fully comply with the provisions of Rule 11.

Neither contention has any merit. If Judge Hall had felt that a probation report were desirable,** it would have been simple for him to order one. There was no necessity to vacate a plea and send petitioner to trial on this ground. In fact, the vacation of the plea is totally inconsistent with a desire to obtain a probation report.

Nor could any alleged dissatisfaction with a possible failure to comply with Rule 11 have in any way influenced Judge Hall's decision. This is clear for the simple reason that the file before Judge Hall did not

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*The two reasons are (1) the appearance of a bargain, and (2) the quantity of narcotics involved.

**A probation report is not required if the court does not wish one. Rule 32(c)(1); *United States v. Williams*, 254 F. 2d 253, 254 (3rd Cir., 1958).

indicate in any way whether or not there had been full compliance with Rule 11. The file merely revealed that a guilty plea had been accepted. Therefore, the Government's attempt to make Judge Hall's accusation seem more palatable cannot be credited. Judge Hall's statement with respect to "the appearance of a deal" meant just what it seems to mean. He relied on the ground that the court and the court-appointed counsel appeared to have entered into an unethical, if not illegal, arrangement.

C. The Government contends that petitioner's counsel conceded that (1) Judge Hall was not bound by Judge Clarke's announcement of a five-year term and that (2) Judge Hall could have sentenced petitioner to a twenty year term on counts one and two (Respondent's Br. 43). The record does not support either contention. To the contrary the very portion of the record relied on by the Government [R. 28-29] reveals that at the time petitioner's counsel moved that the proceedings be transferred back to Judge Clarke for sentencing, he stated that one of the reasons he was doing so was to "avoid being required" at the time of sentence to request that Judge Hall be bound by Judge Clarke's statement. Further the record reveals that in the same colloquy petitioner's counsel advised Judge Hall that when Judge Clarke announced the five year term "He fixed the sentence". [R. 27.] At no time did petitioner's counsel state that despite Judge Clarke's action, Judge Hall could sentence petitioner to a twenty year term on counts one and two.*

*The statement as to the permissible sentence on these counts referred to in the Brief for the United States (p. 43) related to an entirely different matter. The statement was made in justification of Judge Clarke's decision to accept a plea of guilty to two

II.

The Judgment Should Be Reversed Under the Supervisory Power of This Court Over the Administration of Criminal Justice.

As the Brief For The United States points out, this case presents a fundamental problem—the manner in which criminal justice was administered in the district court. (Respondent's Br. 28-31.) The Brief states that a determination of the legal issues in favor of the United States would not resolve the basic question whether the imposition of a twenty-year sentence by Judge Hall in lieu of the five-year sentence previously announced by Judge Clarke "so departs from the appearance of even-handed justice before a district court of the United States that some relief ought to be granted under the supervisory power of this Court." (Respondent's Br. 31.)

We agree with the Government that this is a matter which this Court must resolve in the exercise of its supervisory power. We urge that had the imposition of a twenty-year sentence by one judge following the announcement of a five-year term by another judge of concurrent jurisdiction been the sole factor in the case, this Court under its supervisory powers would be required to reverse with directions to impose the sentence originally announced. But this is not the sole factor. The imposition of petitioner's quadruple sentence was a direct result of a delay in sentence granted at the Government's request and over petitioner's ob-

---

counts instead of insisting that petitioner plead guilty to all five. The statement was made for the purpose of demonstrating that acceptance of pleas on these two counts by no means indicated that any "deal" had been made, since these pleas subjected petitioner to a possible total sentence of forty years.

jections. The delay was for the sole purpose of insuring petitioner's testimony at the trial of a co-defendant—a delay we believe was unlawful. Further petitioner's duly accepted pleas of guilty were vacated over his objections and he was then subjected to the ordeal of trial on these counts. Under these circumstances we urge that the exercise of this Court's supervisory power is even more clearly required.

Moreover, this Court's supervisory power over the administration of criminal justice is not limited in this case to the sentencing question. There is an even more fundamental question raised with respect to the nature and effect of guilty pleas. At page 34 of the Brief For The United States, it is argued that when a defendant pleads guilty to certain counts and other counts are dismissed by the court, the defendant may subsequently be re-indicted and tried on the counts which have been dismissed. Thus, the Government argues that there is no such thing as a binding agreement to accept a plea to a lesser number of counts even though the court has approved the agreement and taken all action required to execute it. In the instant case, this contention is particularly significant since petitioner is not here merely relying on an understanding reached between the court-appointed counsel and the Assistant United States Attorney. Petitioner is relying on the action of Judge Clarke in adopting that agreement by judicial action when he accepted the pleas.

In view of the Government's contentions, we urge that this Court under its supervisory power over the administration of criminal justice should affirm the universal long-standing practice of court-approved settlements of criminal charges. Unless this Court holds

that a dismissal of certain counts upon conviction by plea of guilty on other counts constitutes a bar to re-indictment on the counts dismissed, this universal long established practice will be cast aside and defendants will no longer have any incentive to enter pleas of guilty. If this Court upholds the contention of the Government, the administration of the criminal law in the district courts will be drastically affected and the usefulness of the guilty plea as a tool in administering that law will be destroyed. Since more than 80 percent of criminal cases are currently disposed of by pleas of guilty, the effect of this ruling upon the trial calendar would be felt very quickly.

III.

This Court Should Decide the Question Whether the Postponement of Sentencing Violated Petitioner's Rights.

The first question presented in petitioner's petition for writ of certiorari, and the first issue treated in petitioner's brief, was the unlawful delay in sentencing. The Government, however, has chosen not to reply to this issue on the merits but to rely solely on the proposition that it need not be reached. In view of this, we need not reiterate the reasons why the delay in this case violated petitioner's rights. We will, however, rebut the Government's suggestion that it is unnecessary for this Court to consider the question.

The Government contends that the delay in sentencing pertains only as to counts one and two, since those were the only counts on which petitioner was to be sentenced. Hidden in this argument is a semantic exercise which entirely overlooks the facts of the case and the realities

of the administration of criminal law. The court delayed not only the formal imposition of sentence on counts one and two but also the formal dismissal of counts three, four and five.

The postponement constituted one act. The consequences to petitioner were disastrous. There can be no contraverting the fact that the imposition by Judge Hall of a sentence four times as long as that announced by Judge Clarke was a direct and proximate result of the postponement of sentencing. Therefore, even if it be assumed that the provisions of the Sixth Amendment and Rule 32(a) F. R. Crim. P. are applicable solely to the court's action with respect to counts one and two, the question of the propriety of the delay cannot be avoided; for petitioner is entitled to relief from all prejudice suffered as a result of that delay.

Petitioner urges a further reason why the Sixth Amendment and Rule 32(a) are applicable. We believe that these provisions are applicable to the court's action of June 26, 1958 with respect to all five counts. The postponement of action on counts three, four and five until after the co-defendant's trial was just as improper as the postponement of action on counts one and two. Under the circumstances of this case, petitioner was entitled to have all five counts finally disposed of on June 26, 1958.

Rule 32(a) requires that sentence be imposed without unreasonable delay. We contend that Rule 32(a) is applicable to counts which are to be dismissed at time of sentence as well as to counts on which punishment is to be imposed. Clearly, both such dispositions are part of the sentencing proceedings. However, even if counts to be dismissed were not subject to Rule 32-

(a), they would be subject to the provisions of the Sixth Amendment. For, as we have urged in petitioner's brief (at 17-19), the Sixth Amendment right to a speedy trial includes sentencing proceedings and, indeed, the entire prosecution of a criminal case.

For the above reasons, this Court should determine whether the delay for the purpose here involved was proper.

IV.

The Brief for the United States Ignores the Nature and Legal Effect of Compromise Pleas.

As has been stated above, there is an important place in the criminal law for the disposition of criminal charges by plea of guilty. As an essential part of this system, the compromise of charges has long been accepted by the courts. Such a system gives more than adequate protection to the public interest—particularly in narcotics cases, in view of the 5-year mandatory minimum sentence without possibility of parole, the severe maximum sentences permissible, and the multiplicity of offenses involved in each transaction. In the instant case, the acceptance of the compromise plea on two counts left Judge Clarke with the discretion to impose a total term of forty years.

The Brief For The United States analyzes the legal problems involved in a totally mechanical manner. The Brief treats counts three, four and five as if they had no relation to the guilty pleas entered on counts one and two. The Brief does not deny that petitioner pleaded guilty to these two counts with the understanding that the remaining three counts would be dismissed. Nor does it deny that the court in fact gave judicial

approval to this compromise of the charges by accepting the plea to counts one and two. However, it argues that counts three, four and five remained totally unaffected by this judicial action. It urges that counts three, four and five were subject to trial and that the legality of petitioner's trial thereon must be considered, "wholly apart" from the actions taken with respect to counts one and two. With this position, we are in total disagreement.

We urge that the validity of Judge Hall's actions with respect to counts three, four and five must be considered in the light of the previous actions of Judge Clarke. The fact that a compromise plea was accepted cannot simply be disregarded. We believe that the acceptance of a plea on two counts constituted a judicial settlement of all five counts. Therefore, the Government's attempt to treat counts three, four and five "wholly apart" from the court's actions with respect to counts one and two is contrary to fundamental principles of law and justice.

What the Brief For The United States overlooks is the fact that Judge Hall did not merely order petitioner to trial on counts three, four and five. Rather, he purported to vacate a judicial disposition of all five counts. We cannot now mechanically separate and retroactively re-order Judge Hall's action to fit the present purposes of the Government. He did not, as the Brief For The United States now suggests, determine to subject petitioner to trial on counts three, four and five and then, out of concern for petitioner, vacate his pleas to counts one and two. Judge Hall instead jumped to the conclusion that there was "an appearance of a deal," and on this basis he vacated the entire five-count

disposition. Further, as the Brief For The United States concedes (Respondent's Br. 25, 41), it would have been unfair to petitioner to subject him to trial on counts three, four and five so long as his pleas of guilty to counts one and two remained in effect. Therefore, under the Government's own theory, no trial could have been held on counts three, four and five unless the vacation of counts one and two was lawful. For this reason alone, the Government's attempts to treat counts three, four and five "wholly apart" from counts one and two must fail.

The Government also relies on the technical contention that counts three, four and five had not been formally dismissed. (Respondent's Br. 23, 33.) While this contention is not necessary to its basic argument that a dismissal of some counts as part of a court-approved settlement of an entire indictment does not bar further prosecution of the counts dismissed (Respondent's Br. 34), we believe it requires reply. It is true that no formal dismissal order was entered as to counts three, four and five. However, for the purposes of this case, Judge Clarke's action with respect to counts three, four and five was tantamount to a dismissal. For, as the Government concedes, it would have been unfair to convict petitioner by plea on counts one and two and to require him to stand trial on the remaining counts.

Therefore, the technical question of the formal entry of a dismissal becomes immaterial. The real problem, as the Government recognizes, is whether the pleas on counts one and two were lawfully vacated. If not, the conviction upon those pleas barred any further prosecution on counts three, four and five.

V.
The Vacation of the Guilty Pleas Was Contrary to Law.

Petitioner has urged that a District court has no authority to vacate a duly accepted plea of guilty over a defendant's objection. (Petitioner's Br. 22-27.) Our study of that portion of the brief of the Government which is directed to this question (Petitioner's Br. 42-49) serves only to confirm this view.

The Government does not rely on the common law power of a district court to reconsider judgments during the term of court, since the Government concedes that such power has been abolished by the Federal Rules of Criminal Procedure. Rather, the Government relies on a purported inherent power of the court to reconsider its decisions in a case which has not yet been concluded. While we might concede *arguendo* with respect to civil cases or with respect to rulings during the course of criminal trials that there is an inherent power to modify rulings, this rule is not applicable to one who has been placed in jeopardy, legal and actual, by a conviction. The case has been concluded insofar as conviction is concerned, and the court has no further power with respect to conviction except upon motion of the defendant. (Pet. Br. 26-27.)

The Government bases its contention that there is a power to vacate upon the wholly unsupported assertion that this power is a necessary incident to the "long recognized control of a court over its proceedings." (Resp. Br. 46.) It is readily demonstrable that the purported power to vacate as long as a case is "pending before a court" (Resp. Br. 46) did not exist as late as 1946. This Court has held that federal courts have no

authority to vacate, *sua sponte*, convictions for the purpose of ordering new trials after the expiration of the time during which a defendant may make such a motion.*. The rationale of that decision is equally applicable to the vacation of guilty pleas *sua sponte*. Until 1946, defendants convicted by plea of guilty were not permitted to move for withdrawal of such pleas more than ten days after their conviction (Rule II (4), Criminal Rules of 1933) even though sentence had not been imposed at the end of the ten-day period and the proceedings were still pending before the court. Thus, under the *Smith* rationale, even if there had been any power in a federal court to vacate pleas *sua sponte*,** this power would have terminated not later than ten days after the entry of the pleas—even though sentence had not been imposed and the proceedings were "still pending" before the court.

Therefore, we submit that the power to vacate pleas *sua sponte* while the proceedings are "still pending" is not comprehended within any long standing or well recognized rule as to the plenary power of a court—and certainly no such power should now be implied. This is particularly true where so doing would be in deroga-

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United States v. Smith, 331 U. S. 469, discussed *infra*. This Court there expressly avoided the question whether any such power exists even during the time a defendant could make such a motion. However, it said that the assertion of any such power would raise serious questions of double jeopardy. Although *Smith* involved a vacation *sua sponte*, the vacation was greatly desired by the defendant who argued before this Court that the trial court had the power it asserted.

**While *Smith* involved the power of the court to vacate a conviction under an express Federal Rule relating to new trials (Rule 33 F. R. Crim. P.) the Government does not make any contention that the purported vacation here involved was authorized under any Federal Rule.

tion of the long established right of defendants to be free from successive prosecutions for the same offense.

The Brief for the United States also urges that the court has unlimited discretion under Rule 11, F. R. Crim. P., to accept or reject guilty pleas. We do not believe this is the case. We believe that, once the court determines that an offense has actually been committed and that the plea is voluntarily, intelligently and knowingly entered, a court must accept a plea of guilty and would abuse its discretion if it required a defendant to stand trial merely because it believed his offense was a serious one. (See *Adams v. United States ex rel. McCann*, 317 U. S. 269.) However, regardless of the nature of Rule 11, there is no corollary discretion with respect to vacating pleas once accepted—and the Government offers no precedent for its suggestion that there is such a corollary. The reasons underlying the distinction between the acceptance and vacation of guilty pleas have been fully discussed in petitioner's brief. (*e.g.*, pp. 25-27.)

The Government argues that Judge Hall was justified in vacating the pleas because of the amount of narcotics involved. We do not believe that this is the time to argue the question whether there was or was not a large amount of narcotics involved in this case.* Nor do we believe that this matter is a proper basis for vacating a plea of guilty—or even for determining whether to accept a plea of guilty. The Brief Of The United States states at pages 29, 40 and 42 that the

*We should point out, however, that the amount of narcotics involved cannot be measured by the number of ounces set forth in the indictment since one ounce of pure heroin may contain far more narcotics than 15 ounces of the finished product which persons like petitioner ultimately deliver to purchasers.

amount of narcotics involved justified Judge Hall's action. That brief says:

> "He also found that the amount of heroin involved was very large and his feeling was that, on such a serious charge, the facts should be fully developed before a jury—in other words, that there should either be an acquittal or a consideration of the sentence on the basis of all the facts." (Respondent's Br. 29.)

This argument makes no sense to us. In determining whether a defendant is guilty or innocent, the sole question is whether he in fact committed a violation of the law. The amount of narcotics involved is wholly immaterial to the question of determination of guilt. The appropriate time for consideration of this factor is at the sentencing proceedings. There is no reason why more serious felonies should be tried by juries while less serious felonies may be disposed of by convictions upon pleas. Nor do we know how many ounces of narcotics (pure or otherwise) must be involved before a defendant is required to face the ordeal of trial in lieu of exercising his normal right to plead guilty.

The suggestion that the facts can only be developed at a jury trial is absurd on its face. The court's power to determine facts at sentencing proceedings is far greater than its power to do so during the course of a criminal trial. In fact, the court is not bound by the ordinary rules of evidence when conducting sentencing proceedings. The court may often rely on the report of a probation officer which may be based entirely on hearsay. See *Klingstein v. United States*, 217

F. 2d 711, 713 (4th Cir. 1954). We agree that Judge Hall was influenced in taking his action by the quantity of narcotics involved. However, we feel that not only is this not a justification for his action, but rather that it points up its unlawfulness.

The Government argues that the vacation of petitioner's plea was to petitioner's advantage. In the first place, this is a matter for petitioner and his counsel to decide. In the second place, this argument assumes a basic question in this case—namely, whether counts three, four and five could properly have been tried if counts one and two had not been vacated. We think it is clear that they could not.*

We hope there will be no misunderstanding created by the Government's suggestion that the vacation of the pleas was in the best interests of the defendant. Here again the Government takes a mechanical approach to the law which is far removed from realities and fundamental concepts of justice. Judge Hall vacated not only the pleas of guilty but also repudiated the court approved disposition of all the criminal charges contained in the indictment. He did this not because he felt it to be in the interests of petitioner, but because he was not satisfied with another judge's disposition of

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*Another argument of the Government is that the vacation of the pleas was "in the interests of justice" (Brief for the United States, 26, 44). This general allegation adds nothing to the specific grounds discussed above. It is in fact a conclusion that one or more of those specific grounds justified the vacation.

the case. The Government does not deny that Petitioner, the Assistant United States Attorney and the court all believed that the guilty pleas on counts one and two were intended to constitute a disposition of all five counts. In fact, its brief states "the guilty pleas had been entered on the assumption that petitioner would not be tried." (Respondent's Br. p. 44.) The Government does not deny that the judge who accepted the pleas announced and intended that a five-year sentence be imposed. Under the circumstances, we believe that the subsequent repudiation of this court-approved disposition, and the imposition of a sentence four times as long (following the subjection of petitioner to the ordeal of a totally unwarranted trial) violates the standards of this Court for the administration of criminal law in the federal courts.

Finally, we must emphasize that the basis for Judge Hall's action, as the record clearly reflects, was his unsupported and arbitrary charge that it appeared that Judge Clarke and court-appointed counsel had made a deal. Despite the Government's efforts to find an acceptable rationalization for Judge Hall's act, none can be found.

VI.

Petitioner's Trial Subjected Him to Double Jeopardy.

The Government concedes that had petitioner been sentenced on counts one and two, he would have been placed in jeopardy on those counts. (Respondent's Br. 49.) The Government then urges, however, that until sentence is actually imposed, jeopardy does not attach. Petitioner's brief, however, demonstrates that jeopardy attaches upon the plea. (Petitioner's Br. 34-39.)

The Government urges alternatively that, even if jeopardy did attach upon petitioner's plea, jeopardy was removed upon vacation of that plea. For this proposition, it relies on *Kercheval v. United States*, 274 U. S. 220. *Kercheval* involved a plea which had been withdrawn by a defendant. It in no way stands for the proposition that jeopardy may be removed over a defendant's objection for the purpose of subjecting him to a second prosecution.

The Government attempts to rationalize its conclusion that a defendant's jeopardy may be removed over his objection by analogizing the instant case to one in which a defendant is placed on trial but a mistrial is declared prior to any conviction. We think the distinction is apparent. By pleading guilty, a defendant irrevocably subjects himself to punishment. By contrast, in the case of a trial the defendant merely has been placed n some risk of eventual conviction.

Due to the complex problems inherent in any criminal trial, there is always the possibility that events over which the court has no control may prevent the completion of the prosecution in a manner which will be

fair to the defendant. For example, a juror may die, the judge may become ill, or the defense attorney may for some reason be unable to continue with the trial. This is far different, however, from a situation in which a defendant has actually been convicted, whether by trial or by plea.

A closer analogy would be a trial in which after conviction the court decides that error was committed. The defendant, however, is satisfied with the conviction and does not wish to request a new trial at which he might receive a heavier sentence. Under these circumstances, we do not believe that the court could after conviction order a mistrial or a new trial over the defendant's objections.

Moreover, the power to declare a mistrial without the consent of a defendant is justified only where "extraordinary reasons" exist. *Wade v. Hunter*, 336 U. S. 684. The power to subject a defendant to a second trial in these emergency situations constitutes a very narrow exception to the double jeopardy rule. Further, this Court has recently granted certiorari in *United States v. Gori*, cert. granted 354 U. S. 917, a case which raises serious questions with respect to the exercise of any such power. We do not believe that there can ever be any justification for extending the exception to the double jeopardy rule to post-conviction situations—and certainly if such an extension is to be made there are no circumstances here present which justify doing so in the instant case.

The Government cites cases which stand for the proposition that a defendant may be convicted at one trial on separate counts for separate offenses arising out of a sale of narcotics. *Blockburger v. United States*,

285 U. S. 299; *Gore v. United States*, 357 U. S. 386. The Government also cites cases which stand for the proposition that a defendant may be convicted at one trial on separate counts for the offense of conspiracy and for the separate substantive offense of committing an unlawful act pursuant to that conspiracy. *Pereira v. United States*, 347 U. S. 1. With these principles of law, we need not quarrel.

We do urge, however, that a different rule is applicable in a case in which the Government first obtains a conviction (by plea or trial) for one of the offenses involved and subsequently attempts to convict the same defendant at a separate trial for acts which should properly have been tried at the first proceeding. The necessity for the application of a different rule is, as we stated in petitioner's brief (at 42), made clear in the excellent opinion of Judge Friendly in *United States v. Sabella*, 272 Fed. 206 (2nd Cir. 1959).* His view is shared by the American Law Institute and by legal writers (Petitioner's Br. 43). In this connection, we believe that there can be no doubt that petitioner was placed once in jeopardy by his conviction upon plea of guilty. We urge that his conviction on counts one and two barred any *subsequent* proceeding on counts three.

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*The Brief for the United States attempts to distinguish *Sabella* on the grounds that the defendants in that case had commenced serving their sentences. However, since the court held that the sentences were illegal, it was not the service of the sentence which placed the defendants in jeopardy. The court specifically stated that the jeopardy in *Sabella* stemmed from a conviction upon plea of guilty—and not from the service of sentence. The Brief for the United States also attempts to distinguish *Sabella* on the grounds that that case involved two indictments while the instant case involves only one. However, this distinction is meaningless. The evil involved is the multiple prosecution and the ordeal of a subsequent trial following the first conviction. Whether this subsequent trial is based on a second indictment or on a portion of but one indictment is wholly immaterial.

four and five. However, this case presents an even more persuasive argument for application of the double jeopardy rule than would the ordinary case involving multiple trials for related offenses; for here we have a subsequent trial for unlawful acts which were expressly included within a conspiracy count on which petitioner had previously been convicted.

Petitioner has urged that, following his conviction by plea of guilty, the Double Jeopardy Clause barred vacation of that plea and also barred a subsequent trial on counts three, four and five. Petitioner has also urged that regardless of the applicability of the Double Jeopardy Clause, the district court had no power to vacate the pleas and subject petitioner to trial—or in the event that some such power exists, that the district court abused its discretion. It is beyond dispute that a serious question exists as to the applicability of the Double Jeopardy Clause. For this reason alone, this Court should hold that the district court acted beyond its authority—or in abuse of its discretion—when it vacated the pleas and ordered petitioner to trial.

Constitutional questions must be avoided when there is a reasonable construction of a non-constitutional power which would permit the court to avoid reaching them. In this case, the reasonable construction would be to hold that the district court exceeded its power or abused its discretion when it purported to vacate petitioner's pleas.

The case of *United States v. Smith*, 331 U. S. 469, cited by the Government, is directly applicable. In *Smith*, the question was whether a district judge could vacate a conviction and order a new trial *sua sponte* after the time during which he could have taken such

action at the defendant's request had passed. This Court first pointed out that permitting a judge to vacate a conviction *sua sponte* would raise serious questions of double jeopardy, "For it is (the defendant's) request which obviates any later objection the defendant might make on the ground of double jeopardy" (331 U. S. 474). This Court then held that the district court had no power to vacate the conviction after the time during which petitioner would have requested such action. In so doing it stated that a sufficient reason for reaching this conclusion would be to avoid the question of double jeopardy which would otherwise have arisen.

Smith said, "that a serious constitutional issue would be presented by such a procedure is enough to suggest that we avoid a construction that will raise such an issue". (331 U. S. 475.) In the instant case, we urge that this Court avoid the construction of the district judge's power suggested by the Government since such construction raises the double jeopardy issue.*

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*The Brief for the United States suggests that petitioner has waived his right to assert double jeopardy. This is just not the case. Petitioner objected to the vacation of the pleas and reiterated his objection to the holding of the trial and to that vacation immediately prior to the commencement of the trial. While it is true that the words "double jeopardy" were never specifically spoken, petitioner urged that the court had no authority to subject him to the trial because of his previous conviction by plea. This clearly and sufficiently raised the double jeopardy issue. Further, the double jeopardy issue was fully briefed and argued before the Court of Appeals and was expressly decided by that court [R. 105]. At no time prior to its brief on the merits filed with this Court has the Government ever suggested that the double jeopardy issue was not properly raised. Finally the suggestion of waiver must fail in view of "this Court's own oft-repeated admonition that the courts must 'indulge every reasonable presumption against waiver of fundamental constitutional rights.'" *Emspak v. United States*, 349 U. S. 190, 198. See, also, *Johnson v. Zerbst*, 304 U. S. 458, 464; *Glasser v. United States*, 315 U. S. 60, 70, and *Smith v. United States*, 337 U. S. 137, 150.

The Government's attempt to distinguish the *Petite* case (361 U. S. 529) on its facts is totally unconvincing. No such distinction can be made. (Petitioner's Br. 44-45.) Nor do we agree that the fact that a district judge urged the prosecution requires the Government to withhold application of the *Petite* rule in this Court. We are persuaded that the rule is indeed applicable, and should be adopted by this Court under its supervisory powers. Otherwise, the constitutional question of double jeopardy is squarely raised.

Petite requires that offenses to which the rule is applicable be "alleged and tried together." The Government insists that the offenses here involved were in fact "alleged and tried together." Concededly, they were *alleged* together. But they were not *tried* together. Petitioner was convicted on counts one and two by pleas of guilty entered and accepted on June 26, 1958. Petitioner was then subjected to a separate trial on counts three, four and five in August of 1958.*

Merely charging related offenses in one indictment does not reach the reason for the rule against multiple prosecutions. The reason for the *Petite* rule is not to preclude separate indictments but to proscribe separate attempts to obtain convictions for related offenses. We understand the purpose of the *Petite* policy to be the protection of defendants against the ordeal of addi-

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*For the purposes of this discussion, it is immaterial that counts one and two were again tried in August of 1958 along with counts three, four and five. The contention of the Government is that "wholly apart" from the June 26 conviction on counts one and two, the Government had the legal right to order a subsequent trial on counts three, four and five. The question here involved is whether, following the conviction on counts one and two, it was proper to hold a separate trial on the remaining counts.

tional trials once convicted of an offense which is a part of the same transaction. Under this rule, the Government could not obtain one indictment in eight counts and hold two separate trials, each on four counts. This would be multiple prosecution. So too is the conviction of a defendant upon plea of guilty on a portion of the counts and his subsequent subjection to a separate trial on the remaining counts.

VII.

The Court's Rulings Re Examinations of the Informer Singh Denied Petitioner a Fair Trial.

The Government contends that there is no such thing as a witness hostile *ab initio* and that hostility can be determined only by the witnesses' answers to questions. Petitioner contends to the contrary. *E.g.*, see *Meeks v. United States*, 179 F. 2d 319 (9th Cir. 1950), in which the court held that it was proper for the Government to treat its principal witness as hostile *ab initio*.

The Government cites in support of its contention *Stevens v. United States*, 256 F. 2d 619 (9th Cir. 1958). In *Stevens*, however, the court pointed out that the rule that the party calling a witness cannot impeach him except upon a showing of surprise was subject to much criticism,* and held the rule inapplicable to the case before it.

The Government contends that it was not obliged to call Singh as a witness "merely because he was an in-

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*Compare III Wigmore on Evidence (3rd ed. 1940) §899: "There is no substantial reason for preserving this rule,—the remnant of a primitive notion"; Model Code of Evidence (American Law Institute 1952), p. 119: ". . . [A] rule which has had the disapproval of commentators and thoughtful judges, and which has no reason but history to support it. . . ." The Model Code abolishes the prohibition against impeaching one's own witness. Rule 106.

formant." We agree. Petitioner, however, was obliged, in a very practical sense, to call Singh as a witness. The Court clearly indicated that if petitioner did not call Singh as a witness, it would instruct the jury to presume that Singh's testimony would have been unfavorable to petitioner.*

As a result petitioner was placed in an untenable position. Whether or not he called Singh as a witness, Singh was to be deemed "petitioner's witness." If petitioner did not call Singh, then the court would give the "material witness" instruction against petitioner. On the other hand, when petitioner did call Singh, petitioner was not allowed to treat him as hostile.

The unfairness of this is particularly apparent when it is realized how closely Singh was tied to the Government. Singh was a special employee of the Government [R. 46]; had refused, upon the advice of the Assistant United States Attorney, to discuss the case with petitioner's counsel [R. 84-85]; and was a recent user

*See the lengthy colloquy between the trial judge and defense counsel [R. 73-75]. Judge Hall first stated that he would not give the instruction (on failure to call a material witness) against the Government, because he did not feel that the testimony which the informer could offer was material to the Government's case. He then said that it was up to petitioner's counsel to determine whether or not Singh's testimony was material to petitioner's case. Counsel replied that it was material. Subsequently, the following ensued:

"Mr. Reinhardt: Just to be clear on this, what instruction would your Honor give, would you say?

"The Court: Well, I don't intend to give any at the present state of the case. You may want to call him or you may not. The Government may then want me to give the instruction as to the witnesses that are available to either side; and if one has testimony *which you consider material*, and you fail to call him, in that event it would be against you. So you've got to make up your mind whether or not you are going to call him." (Emphasis added.) [R. 74-75.]

of narcotics, an offense for which he had not been prosecuted by the Government. [R. 83, 86.]

Under these circumstances, it was essential that petitioner be allowed to cross-examine and impeach Singh.

VIII.

The Denial of Petitioner's Motions for Judgment of Acquittal With Respect to Count 5 Was Improper.

The Government's contentions that a sale took place as comprehended by the 5th count of the indictment are without merit. Both petitioner and the Government start with the proposition that the word "sells" is used in 21 U. S. C. §174 in its "ordinary and popular sense". (Resp. Br. 58; Pet. Br. 58.) The Government somehow concludes from this proposition that "whether there has been a sale, therefore, does not turn on niceties of title that have been developed in the law of sales." (Br. 58.) The Government thus confuses the quality of having an ordinary meaning with the quality of having a pliable meaning.

The Government does not, and cannot, contest the proposition that one indicted for a sale under a statute proscribing sales should only be convicted for selling. While the Government criticizes any dependency on niceties of title, it does not make any clear statement as to what elements constitute a sale. If we were to take at face value the Government's quotation from *Hatch v. Oil Co.*, 100 U. S. 124 that "[n]othing was required at common law to give validity to a sale of personal property except the mutual assent of the parties to the contract," then the alleged sale by petitioner to Licuanan and Segura would have been consummated

prior to the time petitioner had any control over the narcotics involved.*

The Government subsequently changes position somewhat and contends that "what is required is simply an agreement of the parties to transfer property plus an appropriation of the property to that end." (Resp. Br. 58.) The Government cites no authority for this latter proposition and gives no explanation as to why the fact of appropriation should make any difference. Of all the crimes proscribed by 21 U. S. C. §174, the act of selling is normally considered to be the most serious. The conduct which Congress was proscribing was the act of transferring narcotics from one person to another. There is no indication that Congress wanted to brand as a seller one who merely appropriated goods for contract, but failed for one reason or another to complete the proposed transaction.

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*The *Hatch* case in no way supports the Government's position. *Hatch* recognizes, as the Government refuses to do here, the difference between an executory contract of sale and a sale. The portion of the opinion in *Hatch* which immediately follows the sentence quoted by the Government states:

> ". . . As soon as it was shown by competent evidence that it was agreed by mutual assent that the one should transfer the absolute property in the thing to the other for a money price, the contract was considered as completely proven and binding on both parties. If the property by the terms of the agreement passed immediately to the buyer, the contract was deemed a bargain and sale; but if the property in the thing sold was to remain for a time in the seller, and only to pass to the buyer at a future time or on certain conditions inconsistent with its immediate transfer, the contract was deemed an executory agreement. Contracts of the kind are made in both forms, and both are equally legal and valid; but the rights which the parties acquire under the one are very different from those secured under the other. . . ." (100 U. S. 130-131.)

We think it essential that criminal statutes not be construed so as to make persons guilty of crimes merely because they indicate a willingness to commit them. The true test of criminality comes when the would-be criminal is put to the test-namely, whether he will go through with his contemplated offense. In this case our contention may not be particularly appealing since petitioner had previously completed three sales to Licuanan. However, the rule here adopted is equally applicable to all—and there are many who will not go through with the transaction, even if only at the very last moment. We do not believe that these persons should be branded as sellers and convicted of that offense, regardless of their preparatory actions, until they actually complete the sale.

In short, it must be recognized, as the Court of Appeals recognized, that no sale had taken place as of the time Licuanan pulled his gun and placed petitioner under arrest. If petitioner, immediately prior to Licuanan's act, had announced to Licuanan that he had changed his mind and would not complete the transaction, the Government would hardly contend that the sale was then complete. If the sale would not be complete under those circumstances, it was not completed under the circumstances of this case at the time Licuanan placed petitioner under arrest. Similarly, it must be recognized, as the Government seems to recognize, that no sale was concluded after Licuanan pulled his gun and placed petitioner under arrest. (Pet. Br. 58-59.) In view of this, the *corpus delicti* of the offense was not established, and the motions for judgment of acquittal as to count five should have been granted.

IX.

The Entrapment Instruction Was Improper.

With respect to petitioner's contention that the entrapment instruction misstated the burden of proof, the Government first contends that the point is not open to petitioner here in view of Rule 30 of the Federal Rules for Criminal Procedure. However, the Government does not cite any authority to indicate that Rule 30 precludes review of an instruction given by the trial court where, as here, a proper instruction was submitted to the court. The instant case falls within the purview of *United States v. Balodimas,* 177 F. 2d 485 (7th Cir. 1949), in which the Government urged a failure to comply with Rule 30. The court, in reversing the trial court, pointed out that:

> ". . . The record shows that the court informed counsel that he was going to give the instruction in controversy in place of the one proposed and that counsel might have an exception, which was noted. This may not be a strict compliance with the rule, but it is not easy to discern what more counsel for the defendant could have done under the circumstances . . ." (P. 488.)

The circumstances which the court set forth in *Balodimas* are exactly those of the instant case. [R. 100-101; 142.]

The Government further contends that in any event the charge was adequate. In support of this contention, the Government quotes from the entrapment instruction itself. However, that instruction misstates the burden of proof. (Pet. Br. 62-63.) Otherwise, the Government points only to that portion of the charge

which states that the burden is on the Government to prove "every material element in the offense" beyond a reasonable doubt. However, the instruction subsequently lists expressly the elements of the offense, and these elements, as listed, do not include, and make no reference to, the entrapment defense. [R. 138-139.] Nowhere in the charge is there any proper allocation of the burden of proof as to that defense.

Conclusion.

The Brief For The United States concludes by requesting that the judgment of the Court of Appeals should be affirmed. We believe, however, that the more significant portion of that brief is that which appears at page 31 where the Government states that it will discuss only the legal issues, and will not comment on whether the judgment should be reversed by this Court under its supervisory power over the administration of criminal justice. We urge that this Court should reverse on the basis of that power—and alternatively we urge that this Court should reverse on the basis of the other legal arguments presented by petitioner. For these reasons we submit that the relief previously requested in petitioner's brief (pp. 63-68) be granted.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 176.—October Term, 1960.

Leonard Saldana, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April 3, 1961.]

Per Curiam.

The petitioner was convicted on four counts of a five-count indictment charging offenses under the narcotics laws. 21 U. S. C. § 174. He complains of a number of alleged trial errors. In addition, he points to a series of events occurring during the course of the prosecution which, he says, operated to deprive him of constitutionally guaranteed rights. It is unnecessary to detail here the course of those proceedings, since we are advised that a change in the calendar system of the District Court for the Southern District of California insures that what occurred in this case will not occur again.

During oral argument in this Court the Solicitor General suggested that the combination of circumstances in this case, beginning with one judge's clearly expressed intention to impose a five-year sentence, and ending with another judge's imposition of a twenty-year sentence under the indictment, was not consistent with that regularity and fairness which should characterize the administration of criminal justice in the federal courts. In the light of the Solicitor General's suggestion, and upon an independent examination of the record, we have concluded that a due regard for the fair administration of justice requires that the convictions under counts 3, 4, and 5 of the indictment be set aside. 28 U. S. C. § 2106; see *Communist Party* v. *Subversive Activities Control*

Board, 351 U. S. 115, 124; *Mesaroch* v. *United States*, 352 U. S. 1, 14; *Marshall* v. *United States*, 360 U. S. 310. Cf. *Petite* v. *United States*, 361 U. S. 529. The conviction under count 2, to which the petitioner originally pleaded guilty, is affirmed.

Because of this disposition of the case, we do not reach for consideration the alleged trial errors with respect to limitation of cross-examination, sufficiency of the evidence of a "sale" under count 5, and instructions to the jury as to entrapment.

So ordered.